

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 1043.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES F. MUNDAY AND ARCHIE W. SHIELS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF WASHINGTON.

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a In the Circuit Court of the United States for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,  
vs.  
CHARLES F. MUNDAY, EARL E. SIEGLEY, ARCHIE W. } No. 1921.  
Shiels, Algernon H. Stracey, defendants in error.

*Transcript of record.*

To the Supreme Court of the United States, Washington, D. C., from the Circuit Court of the United States for the Western District of Washington, Northern Division.

b In the Circuit Court of the United States for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,  
vs.  
CHARLES F. MUNDAY, EARL E. SIEGLEY, ARCHIE W. } No. 1921.  
Shiels, Algernon H. Stracey, defendants in error.

Counsel: B. D. Townsend, Esq., and S. R. Rush, Esq., special assistants to the Attorney-General, attorneys for the United States of America; E. F. Blaine, Esq., Wilmon Tucker, Esq., Ivan L. Hyland, Esq., Walter S. Fulton, Esq., and E. C. Hughes, Esq., attorneys for Charles F. Munday, defendant in error; C. W. Dorr, Esq., and H. E. Hadley, Esq., attorneys for Archie W. Shiels, defendant in error; J. A. Kerr, Esq., and E. S. McCord, Esq., attorneys for Earl E. Siegley, defendant in error.

1 In the Circuit Court of the United States for the Western District of Washington.

Be it remembered that heretofore and on, to wit, the twelfth day of October, A. D. 1910, the same being one of the regular juridical days of the July term, A. D. 1910, of said court, sitting at Tacoma, in the Western Division of said district;

Present: The Honorable George Donworth, district judge;

The following proceedings were had and entered of record in said court, to wit:

In the matter of the grand jury.

At this day come the members of the grand jury, heretofore duly empaneled and sworn as grand jurors, and return into court now here the following true bills of indictment, to wit:

\* \* \* \* \*

THE UNITED STATES OF AMERICA

v.

CHARLES F. MUNDAY, ARCHIE W. SHIELS, EARL E.  
Siegley, and Algernon H. Stracey.

No. 1921.

*Indictment for violation section 5440, R. S.*

(Endorsed:) A true bill.

(Signed)

G. W. NINEMIRE, *Foreman.*

And thereupon, it is ordered by the court that a bench warrant issue without delay against the defendants and returnable forthwith; and that the defendants be let to bail before a United States commissioner for their appearance in this court from day to day and from term to term, to answer unto the indictment herein, each in the sum of two thousand five hundred dollars (\$2,500).

\* \* \* \* \*

And the said indictment is in words and figures as follows, to wit:

2 In the Circuit Court of the United States of America for the Western District of Washington, in the Ninth Circuit, July term, A. D. 1910.

The grand jurors of the United States, within and for said district and circuit, duly selected, impanelled, sworn, and charged, on their oaths present:

That Charles F. Munday, Archie W. Shiels, and Earl E. Siegley, late of the county of King, in the State of Washington, and Algernon H. Stracey, formerly of said county of King, but whose present whereabouts is to said grand jurors unknown, heretofore, to wit, on or about the first day of May, in the year of our Lord nineteen hundred and five, at the city of Seattle, in the State of Washington, in the said Western District of Washington, in said Ninth Circuit, and within the jurisdiction of this court, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together, and together and with divers other persons to the said grand jurors unknown, to defraud the United States of America of the use and possession of and title to large tracts of valuable coal lands then and there a part of the public domain of said United States, situated within the Kayak recording district in the District of Alaska, and in the district of lands attached to the land office situated at Juneau, in the said District of Alaska, and especially all and singular those several contiguous tracts and parcels of its said coal lands which are hereinafter mentioned and described, and which collectively are commonly known as the "Stracey Group" of coal claims, all of which said coal lands then and there were sub-

3       ject to location and entry under the coal-land laws of the United States applicable to said District of Alaska, and all of which said tracts and parcels of coal lands known as the "Stracey Group" were at all the times herein mentioned respectively subject to the several attempted locations, filings, notices of location, coal-land declaratory statements, and entries hereinafter described and mentioned, except for the unlawful, fraudulent, false, feigned, and fictitious character of said attempted locations, filings, notices of locations, coal-land declaratory statements, and entries as herein-after set forth; also to defraud the said United States of its right, function, and privilege of protecting its ownership, use, and possession of said coal lands, and particularly its governmental function of disposing of said coal lands only in the manner provided by the laws of the said United States applicable thereto, and the rules and regulations applicable thereto, then and there in force, and which had theretofore been lawfully established under the authority of the laws of the United States by the Commissioner of the General Land Office with the approval of the Secretary of the Interior; also to defraud the said United States of its right and privilege of relying, and of its security in relying, in the matter of the disposing of said lands under the laws of the United States applicable thereto, upon the good faith, truthfulness, and lawfulness of all affidavits, notices, and other documents, proceedings, and transactions relating to locations upon, and applications to enter and purchase, any and all of the said coal lands; also to defraud the said United States of the governmental and other benefits of a lawful, honest, and proper administration of the aforesaid laws of the United States and

4       the aforesaid rules and regulations applicable to the disposition of said coal lands, and particularly the governmental right and privilege of the said United States, that the benefits of the aforesaid coal-land laws applicable to the aforesaid coal lands of the United States, including possessory rights, preferential rights to purchase and the exercise of said preferential rights by final entry and application to purchase, should be enjoyed only by the persons, at the times, to the extent, and in the manner in that behalf established and prescribed by the aforesaid coal-land laws of the United States applicable to the District of Alaska.

The object and purpose of said unlawful conspiracy were to deprive and defraud the United States of its title, possession, use and enjoyment of the said coal lands, and obtain said coal lands, and the title, possession, use, and enjoyment thereof for the benefit of a certain private corporation, known and designated as the Alaska Development Company, organized and existing under and by virtue of the laws of the State of Washington, and for the benefit of a certain other private corporation, known and designated as the Pacific Coal and Oil Company, reputed to be a corporation organized and existing under and by virtue of the laws and legal authority of some foreign Government, to wit, the Dominion of Canada, or

one of the Provinces thereof, a more particular description of said latter mentioned corporation being to the said grand jurors unknown.

The said coal lands, of which the United States was to be defrauded as aforesaid, consisted of approximately 6,087 acres, situated in a compact body, situated westerly from, and in the immediate vicinity of, Kushtaka Lake and Kushtaka Glacier, and situated approximately seventeen miles northeasterly from Katalla, in the Kayak recording district, in the District of Alaska. Said compact body of coal lands is composed of those certain contiguous coal claims, being forty in number, hereinafter more particularly described. Said coal claims are commonly known and described collectively as the "Stracey Group," and are so described and mentioned herein. The respective names of said coal claims, and the respective areas thereof, as designated and established by the official surveys thereof heretofore made pursuant to the aforesaid laws applicable to the disposition of coal lands in the District of Alaska, and which said surveys and the field notes thereof have heretofore been filed and now are of record in the office of the surveyor general of the United States at Juneau, in said District of Alaska, together with the serial numbers of the aforesaid surveys of said coal claims respectively, as shown by the official records in the aforesaid office of the surveyor general of the United States for the said District of Alaska, are as follows, to wit:

1. The "L. E. Barber" coal claim, area 159.90 acres, United States coal land survey #262.

2. The "R. S. Barber" coal claim, area 159.92 acres, United States coal land survey #269.

3. The "Fred H. Baxter" coal claim, area 159.84 acres, United States coal land survey #268.

4. The "Grant Calhoun" coal claim, area 159.92 acres, United States coal land survey #290.

5. The "Scott Calhoun" coal claim, area 159.88 acres, United States coal land survey #270.

6. The "A. L. Cohen" coal claim, area 157.34 acres, United States coal land survey #281.

6 7. The "J. P. Conway" coal claim, area 159.92 acres, United States coal land survey #267.

8. The "R. S. Cox, jr.," coal claim, area 155.78 acres, United States coal land survey #282.

9. The "S. R. Davidson" coal claim, area 159.96 acres, United States coal land survey #258.

10. The "Stacy B. Emens" coal claim, area 159.90 acres, United States coal land survey #261.

11. The "Walter S. Fulton" coal claim, area 159.86 acres, United States coal land survey #264.

12. The "A. C. Fry" coal claim, area 153.11 acres, United States coal land survey #292.

13. The "Izora V. Fry" coal claim, area 58.74 acres, United States coal land survey #274.

14. The "J. D. Gardner" coal claim, area 159.88 acres, United States coal land survey #263.

15. The "Wm. Gottstein" coal claim, area 159.98 acres (never officially surveyed).

16. The "L. W. Haller" coal claim, area 159.96 acres, United States coal land survey #255.

17. The "Almira Hamilton" coal claim, area 159.80 acres, United States coal land survey #288.

18. The "J. M. Hamilton" coal claim, area 159.82 acres, United States coal land survey #276.

19. The "M. J. Heney" coal claim, area 133.04 acres, United States coal land survey #280.

20. The "P. A. Heney" coal claim, area 138.09 acres, United States coal land survey #287.

21. The "Homer M. Hill" coal claim, area 159.80 acres, United States coal land survey #259.

7 22. The "R. C. Johnston" coal claim, area 159.96 acres, United States coal land survey #256.

23. The "W. R. Johnston" coal claim, area 159.90 acres, United States coal land survey #257.

24. The "J. B. Loughary" coal claim, area 147.24 acres, United States coal land survey #286.

25. The "Horace Middaugh" coal claim, area 128.44 acres, United States coal land survey #270.

26. The "A. C. Miller" coal claim, area 159.84 acres, United States coal land survey #271.

27. The "F. K. Munday" coal claim, area 157.27 acres, United States coal land survey #277.

28. The "P. A. Purdy" coal claim, area 160 acres, United States coal land survey #291.

29. The "E. M. Ratcliffe" coal claim, area 152.34 acres, United States coal land survey #289.

30. The "Geo. M. Rice" coal claim, area 159.96 acres, United States coal land survey #285.

31. The "E. E. Siegley" coal claim, area 159.92 acres, United States coal land survey #284.

32. The "Mabel A. Siegley" coal claim, area 159.78 acres, United States coal land survey #272.

33. The "Chas. Stuver" coal claim, area 122.27 acres, United States coal land survey #278.

34. The "Jessie M. Stuver" coal claim, area 144.01 acres, United States coal land survey #273.

35. The "J. F. Trowbridge" coal claim, area 159.84 acres, United States coal land survey #275.

36. The "M. F. Wight" coal claim, area 159.72 acres, United States coal land survey #260.

8        37. The "J. H. Yeates" coal claim, area 159.84 acres, United States coal land survey #265.

38. The "Kentucky" coal claim, area 112.538 acres, United States coal land survey #73.

39. The "Mascot" coal claim, area 159.80 acres, United States coal land survey #283.

40. The "Minnesota" coal claim, area 159.86 acres, United States coal land survey #75.

The said lands, of which the United States was to be defrauded as aforesaid, were and are of a value exceeding ten million dollars.

It was a part of said unlawful conspiracy, and designed and intended so to be by the said Charles F. Munday, Archie W. Shiels, Earl E. Siegley, and Algernon H. Stracey, and their aforesaid co-conspirators, that the object and purposes of said unlawful conspiracy should be furthered and effected by means of unlawful, fraudulent, false, feigned, and fictitious locations, notices of location preferential rights to purchase, applications to enter and purchase, and final entries and purchases under the aforesaid coal-land laws of the United States applicable to the aforesaid coal lands, that is to say:

That by cunning persuasion and promises of pecuniary reward and other corrupt means, divers persons severally qualified by law (except as hereinafter stated) to make location upon and entry and purchase of said coal lands (said persons being hereinafter referred to and described as "coal-land claimants") should be induced, persuaded and procured to make unlawful, fraudulent, false, feigned, and fictitious locations of certain of said coal lands, ostensibly for the exclusive use and benefit of said coal-land claimants, respectively, but in truth and in fact for the use and benefit of said Alaska Development Company and said Pacific Coal and Oil Company;

That the possession of all of said coal lands should be held, and the use thereof should be enjoyed, by certain persons, ostensibly as the agents of and for the benefit of said coal-land claimants, respectively, but in truth and in fact as the agents of and for the use and benefit of said Alaska Development Company and said Pacific Coal and Oil Company;

That by the aforesaid corrupt and unlawful means each and all of said coal-land claimants, respectively, should be likewise induced, persuaded, and procured to file, and cause and permit to be filed, and that there should be filed, in the office of the recorder for the recording district in which said lands were and are situated, and also in the land office of the United States for the land district in which said coal lands were and are situated, unlawful, false, fraudulent, feigned, and fictitious notices of locations (in form as required by law), supported by unlawful, false, fraudulent, feigned, and fictitious affidavits (in form as required by law), falsely representing, stating, and showing, among other things, that each of said coal-land claimants, respectively, had opened and improved a coal mine upon certain



of said lands, and had expended certain monies in that behalf, and had staked out and located a coal claim including within its boundaries said coal mine, in the manner required by law, and had taken and held possession of said coal claim, and that each of said coal-land claimants, respectively, intended to purchase from the said United States, under and pursuant to the aforesaid coal-land laws applicable to the District of Alaska and particularly the act  
10 of Congress approved April 28, 1904, for the use and benefit of said coal-land claimants, respectively, the said coal lands so pretended to have been located by said coal-land claimants, respectively, as aforesaid, whereas in truth and in fact no coal mine would have been opened or improved by or on behalf of any of said coal-land claimants, respectively, and no coal claim would have been located or staked out by or on behalf of any of said coal-land claimants, respectively, and no monies would have been expended for either or any of said purposes, by or on behalf of said coal-land claimants, respectively, and none of said coal-land claimants, respectively, would have taken or held possession of any of said coal claims, respectively, and none of said coal-land claimants would have intended to purchase from the said United States any of said coal lands in their own behalf or for their own use or benefit, respectively;

That by the means aforesaid, the officers of the United States having authority in such matters, and particularly the register and receiver and other officers of the said land office of the United States in the said land district in which said coal lands were located and situated, should be deceived and induced to believe the statements and representations contained in said notices of locations, affidavits, and other documents, and that thereby said officers should be induced to accept, file, and record said notices of location and said affidavits in support thereof in said land office, and to segregate said coal lands from the public domain and withdraw the same from lawful entry under any of the public-land laws of the United States, and that thereby a preferential right to purchase said lands, ostensibly lawful,  
11 honest and true, but in fact unlawful, fraudulent, false, feigned, and fictitious, should be created in favor of each of said coal-land claimants, respectively, for the coal claims so pretended to have been located by said coal-land claimants as aforesaid, respectively;

That thereafter said coal-land claimants, respectively, should hold and exercise said pretended and unlawful preferential rights to purchase said coal lands, respectively, and all rights incident thereto, ostensibly for their own use and benefit, respectively, but in truth and in fact for the use and benefit of said Alaska Development Company and said Pacific Coal and Oil Company;

That thereafter said coal-land claimants, respectively, should, in the form and ostensibly in the manner provided by law, make application to enter and purchase, and enter and purchase said coal lands, and said coal claims, respectively, ostensibly for their own use and benefit, respectively, but in truth and in fact for the use and benefit of

said Alaska Development Company and said Pacific Coal and Oil Company;

That all of said locations, possessory rights, preferential rights to enter and purchase, applications to enter and purchase, and entries and purchases, respectively, should be made, acquired, and held and exercised by and in the name of said coal-land claimants, respectively, and ostensibly for the use and benefit of said coal-land claimants, respectively, but in truth and in fact for the use and benefit of said Alaska Development Company and said Pacific Coal and Oil Company;

That thereby the said Alaska Development Company and said Pacific Coal and Oil Company should receive and enjoy the benefits of a greater number of locations and entries of said coal lands, and for a greater quantity of said coal lands, than allowed by law.

The respective shares of said Alaska Development Company and said Pacific Coal and Oil Company in the fruits and benefits of said unlawful conspiracy, and the respective rights and interests of said corporations therein, as contemplated and intended in and by said unlawful conspiracy, so far as known to the said grand jurors, were to be as follows: Said Alaska Development Company was to receive and enjoy the title, use, and value of all of said coal lands, subject to a certain contract entered into between said corporations prior to the transactions herein set forth, and which was in full force and effect during all of the times herein mentioned, whereby, as between said corporations, the said Pacific Coal and Oil Company was entitled to take and hold possession of said coal lands, operate the mines thereupon, and extract the coal therefrom, paying a royalty therefor to said Alaska Development Company, and with an option in favor of said Pacific Coal and Oil Company to purchase all of said coal lands within certain stated times and for certain stated prices.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, on, to wit, the respective dates hereinafter mentioned, cause each of the aforesaid coal claims to be surveyed by a mineral surveyor of the United States duly appointed and qualified therefor according to law, to wit, one Charles S. Hubbell, said surveys being intended for use in applications to enter and purchase the aforesaid coal claims by the respective claimants thereof; and thereafter, and in further pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, on, to wit, the respective dates hereinafter mentioned, file and cause to be filed in the office of the Surveyor General of the United States for the District of Alaska, then and there established and being at Juneau in said District of Alaska, each and



all of said official surveys, and the field notes thereof; the names of said coal claims, the dates of the aforesaid surveys thereof and the dates of the filing of said surveys and the field notes thereof, respectively, being as follows, to wit:

| Name of claim.      | Date of survey.    | Date of filing of survey. |
|---------------------|--------------------|---------------------------|
| L. E. Barber        | Sept. 4, 1907      | March 7, 1908.            |
| R. S. Barber        | Sept. 8, 1907      | March 11, 1908.           |
| Fred H. Baxter      | Sept. 15, 16, 1907 | March 9, 1908.            |
| Grant Calhoun       | Nov. 6, 7, 1907    | April 6, 1908.            |
| Scott Calhoun       | Sept. 9, 10, 1907  | March 11, 1908.           |
| A. L. Cohen         | Oct. 15, 16, 1907  | March 30, 1908.           |
| J. P. Conway        | Sept. 14, 1907     | March 9, 1908.            |
| R. S. Cox, jr.      | Oct. 17, 18, 1907  | March 30, 1908.           |
| S. R. Davidson      | Aug. 28, 29, 1907  | March 5, 1908.            |
| Stacey B. Emens     | Sept. 2, 3, 1907   | March 7, 1908.            |
| Walter S. Fulton    | Sept. 6, 7, 1907   | March 7, 1908.            |
| A. C. Fry           | Oct. 28, 29, 1907  | April 6, 1908.            |
| Izora V. Fry        | Sept. 22, 23, 1907 | March 12, 1908.           |
| J. D. Gardner       | Sept. 5, 6, 1907   | March 7, 1908.            |
| Wm. Gottstein       |                    | No survey.                |
| L. W. Haller        | Aug. 24, 25, 1907  | March 5, 1908.            |
| Almira Hamilton     | Oct. 30, 31, 1907  | April 4, 1908.            |
| J. M. Hamilton      | Sept. 24, 25, 1907 | March 27, 1908.           |
| M. J. Heney         | Oct. 13, 14, 1907  | March 28, 1908.           |
| P. A. Heney         | Oct. 26, 27, 1907  | April 4, 1908.            |
| Homer M. Hill       | Aug. 31, 1907      | March 5, 1908.            |
| R. C. Johnston      | Aug. 25, 26, 1907  | March 5, 1908.            |
| W. R. Johnston      | Aug. 27, 28, 1907  | March 5, 1908.            |
| J. B. Loughary      | Oct. 25, 26, 1907  | March 31, 1908.           |
| Horace Middaugh     | Oct. 11, 12, 1907  | March 28, 1908.           |
| A. C. Miller        | Sept. 16, 17, 1907 | March 11, 1908.           |
| F. K. Munday        | Sept. 25, 26, 1907 | March 27, 1908.           |
| P. A. Purdy         | Oct. 1, 3, 1907    | April 6, 1908.            |
| E. M. Ratcliffe     | Nov. 4, 5, 1907    | April 4, 1908.            |
| Geo. M. Rice        | Oct. 23, 24, 1907  | March 31, 1908.           |
| E. E. Siegley       | Oct. 21, 22, 1907  | March 31, 1908.           |
| Mabel A. Siegley    | Sept. 19, 20, 1907 | March 12, 1908.           |
| Chas. Stuver        | Oct. 10, 11, 1907  | March 28, 1908.           |
| 14 Jessie M. Stuver | Sept. 20, 22, 1907 | March 12, 1908.           |
| J. F. Trowbridge    | Aug. 30, 1907      | March 27, 1908.           |
| M. F. Wight         | Sept. 1, 2, 1907   | March 5, 1908.            |
| J. H. Yeates        | Sept. 11, 12, 1907 | March 9, 1908.            |
| Kentucky            | Oct. 7, 9, 1907    | Nov. 26, 1907.            |
| Mascot              | Oct. 19, 20, 1907  | March 30, 1908.           |
| Minnesota           | Sept. 18, 19, 1907 | Nov. 26, 1907.            |

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, on, to wit, the fourteenth day of January, in the year of our Lord nineteen hundred and nine, at Juneau, in said District of Alaska, subscribe to an application to enter and purchase that certain coal claim hereinbefore mentioned, known and described as the "Mascot" coal claim, and did then and there swear to the contents of said application before one John W. Dudley, then and there being the register of the said land office of the United States at Juneau, in said District of Alaska; and did then and there file said application in

said land office of the United States at Juneau, in said District of Alaska; said application to enter and purchase being in the form required by law and the rules and regulations of the Interior Department applicable thereto.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Charles F. Munday did knowingly, unlawfully, and corruptly, on, to wit, the twenty-ninth day of March, in the year of our Lord  
 15 nineteen hundred and nine, at Seattle, in the State of Washington, and within the jurisdiction of this court, induce, procure, and persuade one Fred H. Baxter to, and the said Fred H. Baxter then and there did, subscribe and swear to a certain document consisting of an application to enter and purchase, under the aforesaid laws of the United States applicable to the disposition of coal lands in the District of Alaska, the said "Fred H. Baxter" coal claim, said application to purchase being supported by the affidavit of said Fred H. Baxter, and said document being in the form required by the aforesaid laws of the United States and the aforesaid rules and regulations of the Interior Department applicable thereto; and the said Charles F. Munday did then and there subscribe to a certain certificate appended to and a part of said document, and therein and thereby did certify, as a notary public for the State of Washington, that the said Fred H. Baxter did then and there swear to the truthfulness of the statements therein contained.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Charles F. Munday did knowingly, unlawfully, and corruptly, on, to wit, the respective dates hereinafter mentioned, at Seattle, in the State of Washington, and within the jurisdiction of this court, induce, procure, and persuade each of the persons hereinafter mentioned, to, and each of said persons, respectively, then and there did, subscribe and swear to a certain document consisting of an application to enter and purchase, under the aforesaid laws of the United  
 16 States applicable to the disposition of coal lands in the District of Alaska, certain of the aforesaid coal claims hereinbefore mentioned and described, each of said applications to purchase being supported by the affidavit of the person so subscribing and swearing to the same respectively, and each of said documents being in the form required by the aforesaid laws of the United States and the aforesaid rules and regulations of the Interior Department applicable thereto; and the said Charles F. Munday did at the place aforesaid, and at the respective times aforesaid, subscribe to a certain certificate appended to and a part of said documents, respectively, and therein and thereby did certify, as a notary public for the State of Washington, that the persons so subscribing and swearing to said

documents, respectively, as aforesaid did, at the place aforesaid, and at the times aforesaid, respectively, swear to the truthfulness of the statements therein contained; the names of the persons so subscribing and swearing to said documents, the dates upon which they were subscribed and sworn to as aforesaid, and the names of the coal claim to which they related, being, respectively, as follows, to wit:

| Name of person.          | Date of document.   | Name of coal claim. |
|--------------------------|---------------------|---------------------|
| Grant Calhoun.....       | March 26, 1909..... | Grant Calhoun.      |
| Scott Calhoun.....       | March 26, 1909..... | Scott Calhoun.      |
| Aaron L. Cohen.....      | Nov. 24, 1908.....  | A. L. Cohen.        |
| Rose M. Conway.....      | Feb. 18, 1909.....  | J. P. Conway.       |
| Samuel R. Davidson.....  | March 25, 1909..... | S. R. Davidson.     |
| Stacy B. Emens.....      | March 26, 1909..... | Stacey B. Emens.    |
| Walter S. Fulton.....    | March 29, 1909..... | Walter S. Fulton.   |
| John D. Gardner.....     | March 29, 1909..... | J. D. Gardner.      |
| Louis W. Haller.....     | March 29, 1909..... | L. W. Haller.       |
| Almira Hamilton.....     | March 24, 1909..... | Almira Hamilton.    |
| Homer M. Hill.....       | March 29, 1909..... | Homer M. Hill.      |
| Will R. Johnston.....    | April 9, 1909.....  | W. R. Johnston.     |
| John B. Loughary.....    | Nov. 4, 1908.....   | J. B. Loughary.     |
| Arthur C. Miller.....    | March 25, 1909..... | A. C. Miller.       |
| Frank K. Munday.....     | Nov. 19, 1908.....  | F. K. Munday.       |
| Perclval A. Purdy.....   | Dec. 17, 1908.....  | P. A. Purdy.        |
| Edward M. Ratcliffe..... | Nov. 5, 1908.....   | E. M. Ratcliffe.    |
| Kate L. Trowbridge.....  | Feb. 25, 1909.....  | J. F. Trowbridge.   |
| Milton F. Wight.....     | Dec. 4, 1908.....   | M. F. Wight.        |

17 And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shields did knowingly, unlawfully, and corruptly, on, to wit, the twenty-first day of October, in the year of our Lord nineteen hundred and nine, at Cordova, in the District of Alaska, subscribe and swear to a certain document in writing, which is in words and figures as follows, to wit:

"In the United States land office, Juneau, Alaska.

"IN THE MATTER OF THE APPLICATION OF L. E. Barber for patent to the lands embraced in the L. E. Barber coal claim, situated in the Kayak recording district, District of Alaska. Agent's affidavit of posting of notice and plat of claim.

"DISTRICT OF ALASKA, *third division, Kayak recording district, ss:*

"Archie W. Shields, being first duly sworn according to law, deposes and says that he is the agent for L. E. Barber, who is the applicant for patent for the L. E. Barber coal claim, U. S. coal land survey No. 262, situate in the Kayak recording district, District of Alaska.

"That a notice of his application for a United States patent for said coal claim, together with a plat of the official survey of said claim, approved by the United States surveyor general of Alaska, remained posted in a conspicuous place upon said L. E. Barber coal

claim from the 19th day of January, A. D. 1909, to and including the 1st day of June, A. D. 1909.

"ARCHIE W. SHIELS.

18 "----- }  
----- } ss.  
----- }

"Subscribed and sworn to before me this 21 day of October A. D. 1909.

"[SEAL]

"W. S. McCUNE,

"*Notary Public, District of Alaska, residing at Cordova.*"

And the grand jurors aforesaid, on their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, at Cordova, in the District of Alaska, on, to wit, the twenty-first day of October, in the year of our Lord nineteen hundred and nine, subscribe and swear to certain documents, to wit, thirty-seven in number, each being designated as "Agents affidavit of posting of notice and plat of claim," and each of said documents being in the form of the document last above quoted and set forth, and each of said documents being in the form required by the aforesaid laws of the United States and the aforesaid rules and regulations of the Interior Department applicable thereto, and each of said documents being sworn to before the said W. S. McCune as notary public for the District of Alaska, residing at Cordova, and said documents relating, respectively, to certain applications to purchase and obtain patents for certain of said coal claims hereinbefore mentioned and described, respectively, said applications then and there pending in said land office of the United States at Juneau, in said District of Alaska, and said documents, respectively, then and there stating and representing that notices of the aforesaid applications to purchase and obtain patents for said coal claims, respectively, together with a plat of the official survey

19 of said coal claims, respectively, had been posted in a conspicuous place upon said coal claims, respectively, in the manner, and for the period of time required by the aforesaid laws of the United States and the aforesaid rules and regulations of the Interior Department applicable thereto; the names of the said applicants to purchase and obtain patents for said coal claims, and the coal claims to which said applications related, being respectively as follows, to wit:

| Name of applicant.  | Name of coal claim. |
|---------------------|---------------------|
| R. S. Barber.....   | R. S. Barber.       |
| Fred H. Baxter..... | Fred H. Baxter.     |
| Grant Calhoun.....  | Grant Calhoun.      |
| Scott Calhoun.....  | Scott Calhoun.      |
| A. L. Cohen.....    | A. L. Cohen.        |
| J. P. Conway.....   | J. P. Conway.       |
| R. S. Cox, jr.....  | R. S. Cox, jr.      |
| S. R. Davidson..... | S. R. Davidson.     |

| Name of applicant. | Name of coal claim. |
|--------------------|---------------------|
| Stacey B. Emens    | Stacey B. Emens.    |
| Walter S. Fulton   | Walter S. Fulton.   |
| A. C. Fry          | A. C. Fry.          |
| Izora V. Fry       | Izora V. Fry.       |
| J. D. Gardner      | J. D. Gardner.      |
| L. W. Haller       | L. W. Haller.       |
| Almira Hamilton    | Almira Hamilton.    |
| J. M. Hamilton     | J. M. Hamilton.     |
| M. J. Heney        | M. J. Heney.        |
| P. A. Heney        | P. A. Heney.        |
| Homer M. Hill      | Homer M. Hill.      |
| R. C. Johnston     | R. C. Johnston.     |
| W. R. Johnston     | W. R. Johnston.     |
| J. B. Loughary     | L. B. Loughary.     |
| Horace Middaugh    | Horace Middaugh.    |
| A. C. Miller       | A. C. Miller.       |
| F. K. Munday       | F. K. Munday.       |
| P. A. Purdy        | P. A. Purdy.        |
| E. M. Ratcliffe    | E. M. Ratcliffe.    |
| Geo. M. Rice       | Geo. M. Rice.       |
| E. E. Siegley      | E. E. Siegley.      |
| Mabel A. Siegley   | Mabel A. Siegley.   |
| Chas. Stuver       | Chas. Stuver.       |
| Jessie M. Stuver   | Jessie M. Stuver.   |
| J. F. Trowbridge   | J. F. Trowbridge.   |
| M. F. Wight        | M. F. Wight.        |
| J. H. Yeates       | J. H. Yeates.       |
| C. A. McGregor     | Kentucky.           |
| H. R. Simpson      | Minnesota.          |

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Charles F. Munday did knowingly, unlawfully, and corruptly, on, to wit, the twenty-second day of October, in the year of our Lord nineteen hundred and eight, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "John W. Dudley, Esq., Register U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"Law office of Chas. F. Munday. P. O. Box 519. Cable address, 'Munday, Seattle.' Code used, Bedford McNeill.

SEATTLE, WASH., Oct. 22, 1908.

"JOHN W. DUDLEY, Esq.,

"Register U. S. Land Office, Juneau, Alaska.

"DEAR SIR: I enclose herewith application of patent, affidavit, and power of attorney in the matter of the coal claim filed upon by Grant Calhoun.

"I have forwarded several others during the past few days, and others I think have forwarded theirs direct. As you will notice the number of the survey in the affidavit and the application is blank.

"As I have never been furnished with the number of any of the surveys, except those in cases where you sent me the final proof papers, will you kindly fill in the proper number before filing?

"Yours truly,

"Enc.

"CHAS. F. MUNDAY."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy; and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly,

21 on, to wit, the sixth day of January, in the year of our Lord nineteen hundred and nine, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "John W. Dudley, Register, U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"M. J. Heney, railway contractor, Colman Building. Cable address, 'Heney'."

"SEATTLE, WASH., Jan. 6-09.

"JOHN W. DUDLEY,

"Register U. S. Land Office, Juneau, Alaska.

"DEAR MR. DUDLEY: I enclose you herewith applications for patents to the following coal claims: G. M. Rice, M. A. Siegley, I. V. Fry, Chas. Stuver, P. A. Heney, H. Middaugh, J. M. Stuver, E. E. Siegley, A. C. Fry, P. A. Purdy, M. F. Wight.

"In addition to these, I am enclosing you the notices for publication for thirty-seven of the forty coal claims that I am agent for. I would be much obliged if you would have these notices of publication in shape for me to take to Katalla with me when the 'Portland' comes along to Juneau, which will be about the 14th. I am going to Kyak on that steamer, and will start advertising on these claims as soon as I get there. The application for patent to the Mascot coal claim, located by myself, is now in your possession. I sincerely trust that you will have these papers, plats, etc., ready for me on the 'Portland's' arrival, as it will inconvenience me very much, indeed, if I can not get them then, as we have other work to do at Kyak which makes it almost imperative for me to go there on this vessel.

"I should like to have you advise me if Mr. Stracey and Mr. Steel have the right to assign their claims before making final application for patent, and if they have, would it be possible under the law for myself and Mr. Siegley to purchase these claim from Mr. Stracey and Mr. Steel and proceed to patent them in our own names.

22 As you know, both of us have located claims already, but I am of the opinion that we can proceed to patent these additional claims by right of purchase. This information I will get from you when we arrive on the 'Portland.'



"With kind regards to yourself and Mr. Mullen, and wishing you both the compliments of the season, I am,

"Sincerely, yours,

"ARCHIE W. SHIELS.

"AWS Encl.

"P. S.—I will bring up the application of M. J. Heney with me."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present :

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Earl E. Siegley did knowingly, unlawfully, and corruptly, on, to wit, the thirteenth day of January, in the year of our Lord nineteen hundred and nine, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "Mr. John W. Dudley, Register of the Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit :

"M. J. Heney, railway contractor, Colman Building. Cable address 'Heney.'

"SEATTLE, WASH., January 13, 1909.

"MR. JOHN W. DUDLEY,

*"Register of the Land Office, Juneau, Alaska.*

"DEAR SIR: Herewith please find three papers for filing in connection with the application for patent for coal lands in the Kayak coal fields district, Alaska.

"I notice that the number of the official survey is not mentioned on the papers; however, as you have all the other records on file in connection with this coal claim, I wish you would kindly supply the necessary information. Mr. Shiels, my attorney in this matter, has

no doubt informed you that this application would reach you  
23 within a few days after he had seen you at Juneau this week.

"If everything is not satisfactory, kindly advise me by letter or cable, collect, and oblige. I am,

"Yours, very truly,

M. J. HENEY,  
By E. E. SIEGLEY."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present :

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, on, to wit, the nineteenth day of January, in the year of our Lord nineteen hundred and nine, at Katalla, in the District of Alaska, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Katalla, inclosed in an envelope addressed to "J. W. Dudley, Esquire, Register U. S. Land

Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"M. J. Heney, railway contractor, Colman Building. Cable address, 'Heney.'

"KATALLA, ALASKA, *Jany. 19th, 09.*

"J. W. DUDLEY, Esqre.,

*"Register U. S. Land Office, Juneau, Alaska.*

"MY DEAR SIR: I am leaving this morning to post the notices on the coal claims, and would like to know from you if it is necessary for me to stay right on the ground myself in addition to the two watchmen that I have up there watching the notices during the whole period that they are posted on the ground, or if the two men will be all that is necessary; also please advise me if you wish the notices taken down and returned to you at the end of the sixty days, or if they will remain there.

"I will be obliged if you will advise me as to these things on the 'Bertha.'

"Very sincerely, yours,

"ARCHIE W. SHIELS."

24 And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, on, to wit, the twenty-second day of March, in the year of our Lord nineteen hundred and nine, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "J. W. Dudley, Esq., Registrar, U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"(Copper River Railway, M. J. Heney, contractor.)

"SEATTLE, WASHINGTON, *March 22, 1909.*

"J. W. DUDLEY, Esq.,

*"Registrar U. S. Land Office, Juneau, Alaska.*

"DEAR SIR: Enclosed you will please find applications for patent of a coal claim of the heirs of J. P. Conway, R. C. Johnson, and John F. Trowbridge. Will you please place these applications on file and return to me at this office the plats, etc., for putting on the claims and the necessary authority to the publisher of the Katalla Herald to publish these claims for patent. Kindly return these papers to me as soon as possible, as I expect to get away for the north early during the coming month.

"Will you please return to me the maps of the Gottstein coal claim, as I am desirous of having a copy of the same made, and Mr. MacPherson has no copies here?

"With kindest regards, I am,

"Yours, faithfully,

"ARCHIE W. SHIELS."



And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

25 That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Earl E. Siegley did knowingly, unlawfully, and corruptly, on, to wit, the third day of April, in the year of our Lord nineteen hundred and nine, at Seattle, in the State of Washington, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "Mr. J. W. Dudley, Registrar, U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"(Copper River Railway, M. J. Heney, contractor.)

"SEATTLE, WASH., April 3, 1909.

"MR. J. W. DUDLEY,

"Registrar U. S. Land Office, Juneau, Alaska.

DEAR SIR: Enclosed herewith please find application for patent on Alaska coal lands of Izora V. Fry. This application is to replace one which was sent you in typewritten form instead of printed, as required by the land office. Our agent, Mr. Shiels, requested me to mail this direct to you.

"Trusting you will find this in order, I am,

"Yours, very truly,

"EES/C.

"E. E. SIEGLEY."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Charles F. Munday did knowingly, unlawfully, and corruptly, on, to wit, the nineteenth day of April, in the year of our Lord nineteen hundred and nine, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "John W. Dudley, Esq., U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"(Law office of Chas. F. Munday. P. O. Box 1813. Cable address, 'Munday, Seattle.' Code used, Bedford McNell.)

"SEATTLE, WASH., April 19, 1909.

"JOHN W. DUDLEY, Esq.,

"U. S. Land Office, Juneau, Alaska.

"DEAR SIR: I had arranged to sent up by Mr. Shiels the coal-land applications of the heirs of R. C. Johnston, the heirs of J. F. Trowbridge, and the heirs of J. P. Conway, and had the papers already on my desk. Mr. Shiels went north without my having had an opportunity to hand the papers to him, and as the papers are

gone I think probably he took them with him. Will you kindly advise me whether he has filed them?

"Yours, truly,

CHAS. F. MUNDAY."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, on, to wit, the thirtieth day of July, in the year of our Lord nineteen hundred and nine, at Allan Camp, Cordova, Alaska, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at Cordova, in the said district of Alaska, inclosed in an envelope addressed to "John W. Dudley, Esqre., Register, U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures, as follows, to wit:

"(Copper River Railway, M. J. Heney, contractor.)

ALLAN CAMP, CORDOVA, ALASKA,

July 30th, 09.

"JOHN W. DUDLEY, Esqre.,

*"Register, U. S. Land Office, Juneau, Alaska.*

27 "DEAR SIR: I hand you herewith proof of publication for 36 coal claims as follows: A. C. Fry, J. M. Hamilton, Izora V. Fry, Grant Calhoun, E. E. Siegley, A. L. Cohen, Almira Hamilton, Geo. M. Rice, Jessie M. Stuver, Scott Calhoun, R. S. Barber, A. C. Miller, Mabel A. Siegley, Mascot, J. H. Yeates, J. D. Gardner, Fred H. Baxter, Minnesota, L. W. Haller, W. R. Johnston, Homer M. Hill, S. R. Davidson, J. B. Loughary, P. A. Heney, P. A. Purdy, L. E. Barber, M. F. Wright, Stacey B. Emens, Walter S. Fulton, F. K. Munday, Horace Middaugh, Kentucky, R. S. Cox, jr., Chas. Stuver, E. M. Ratcliffe, M. J. Heney.

"I thank you for your telegram giving me permission to publish the application for the Johnson, Trowbridge, and Conway claims in the Cordova Alaskan in place of the defunct Katalla Herald. With kindest regards to yourself and Mr. Mullen.

"Yours, faithfully,

"Encl. A.W.S./F.

"ARCHIE W. SHIELS, Agent."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Charles F. Munday did knowingly, unlawfully, and corruptly, on, to wit, the sixteenth day of August, in the year of our Lord nineteen hundred and nine, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a

certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "Register, U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures, as follows, to wit:

28 "Law office of Chas. F. Munday. P. O. Box 1813. Cable address, 'Munday, Seattle.' Code used, Bedford McNeil.

"SEATTLE, WASH., August 16, 1909.

"REGISTER U. S. LAND OFFICE,

"Juneau, Alaska.

"DEAR SIR: Some weeks ago I wrote inquiring as to the date upon which payment had to be made for a number of coal-land entries that I represent, but have received no reply. I would like to be advised, so as to be in position to forward the money when it is required.

"Yours truly,

"CHAS. F. MUNDAY."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly on, to wit, the eighteenth day of October, in the year of our Lord nineteen hundred and nine, at Cordova, in the said District of Alaska, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Cordova, inclosed in an envelope addressed to "Hon. John W. Dudley, Register, United States Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"CORDOVA, ALASKA, October 18, 1909.

"HON. JOHN W. DUDLEY,

"Register, United States Land Office, Juneau, Alaska.

"MY DEAR SIR: I enclose you herewith proof of publication covering R. C. Johnson, J. P. Conway, and J. F. Trowbridge coal claims, for which I am agent.

"This completes the proof of publication on 39 of the 40 claims that I am representative for. The other claim will come to you later.

"I have sent down to Seattle the affidavits of posting, as Mr. L. V. Leeper (one of our employees here), who was on the ground during the whole time of posting, and who did, or assisted in doing, all of it, was taken sick and had to leave for Seattle hurriedly before I could get his signature. They will be signed by him and returned to your office direct from Seattle by Mr. McPherson.

"The affidavit of agent as to posting I will send you under separate cover from here.

"This, I think, completes all the necessary documents in connection with these claims; and I will be very much obliged to you, indeed, if you will write me at your earliest convenience, advising me at what date the final payment on these claims becomes due to the Government. I should appreciate it very much if you will give me this information by return mail, if possible, as I wish to get all my work in connection with these claims put in shape before the end of the year.

"With kindest regards to Mr. Mullen and your good self,

"Yours, very sincerely,

"ARCHIE W. SHIELS."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, on, to wit, the ninth day of November, in the year of our Lord nineteen hundred and nine, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "Mr. J. W. Dudley, Register, U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"SEATTLE, WASHINGTON, Nov. 9, 1909.

"MR. J. W. DUDLEY,

"Register, U. S. Land Office, Juneau, Alaska.

"DEAR SIR: Enclosed please find my 'affidavits of posting notice and plat,' together with the 'affidavits of witnesses to posting' for the coal claim of myself and those of 38 claimants for whom I am  
30 acting as agent; all of which are situate in the Kayak recording district, Alaska.

"Yours, very truly,

"ARCHIE W. SHIELS.

"B."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Charles F. Munday did knowingly, unlawfully, and corruptly, on, to wit, the sixteenth day of March, in the year of our Lord nineteen hundred and ten, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "Archie W. Shiels, Esq., c/o M. J. Heney, Esq., Colman Building,

Seattle," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"MARCH 16, 1910.

"ARCHIE W. SHIELS, Esq.,

*"c/o M. J. Heney, Esq., Colman Building, Seattle.*

"DEAR SIR: I received a wire from the Pacific Coal & Oil Company under date of March 11th as follows:

"Fifty-eight thousand dollars has been transferred to our credit, Seattle, to meet all payments coal claims. Please act in concert with Shiels in taking mortgage security from various applicants represented by you and Shiels."

"I have prepared a form of mortgage, copy enclosed, and have forwarded same to Toronto for their approval.

"If the form is satisfactory, as soon as I receive from you the statement of the amount expended on each claim I will attend to securing the execution of the several mortgages.

"Yours, very truly,

"Enc. -1.

"CHAS. F. MUNDAY."

31 And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Charles F. Munday did knowingly, unlawfully, and corruptly, on, to wit, the sixth day of May, in the year of our Lord nineteen hundred and ten, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at Seattle, inclosed in an envelope addressed to "Archie W. Shiels, Esq., c/o Copper River & Northwestern Ry. Co., Cordova, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"MAY 6, 1910.

"ARCHIE W. SHIELS, Esq.,

*"c/o Copper River & Northwestern Ry. Co.,  
Cordova, Alaska.*

"DEAR MR. SHIELS: I am just in receipt of your favor of April 28th, enclosing receipts covering amount paid to the receiver of the land office at Juneau for the 26 coal entries which I represent.

"These receipts are not the final receipts, so often referred to. They are simply receipts for the money. The final receipt or certificate of purchase, which amount practically to the conveyance of the equitable title, and which forms the basis for the patent, is a totally different document, which I take it has not yet been issued by the land office.

"Such receipt is issued upon the approval of the final proof papers by the register and receiver, and is in itself an evidence of title.

"I presume, while the present agitation continues, the land office at Juneau, acting under instructions from Washington, will hold up the issuance of the final receipts until the entries have been passed upon by the Commissioner of the General Land Office.

"I will write, however, to Juneau at once, and inquire what has been or will be done in this respect.

"Yours, truly,

CHAS. F. MUNDAY."

32 And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Charles F. Munday did knowingly, unlawfully, and corruptly, on, to wit, the sixth day of May, in the year of our Lord nineteen hundred and ten, at Seattle, in the State of Washington, and within the jurisdiction of this court, sign his name to a certain letter, and did then and there deposit the same in the post office of the United States at said Seattle, inclosed in an envelope addressed to "Register and Receiver, U. S. Land Office, Juneau, Alaska," with the postage duly prepaid thereon, and which letter is in words and figures as follows, to wit:

"[Law office of Chas. F. Munday. P. O. Box 1813. Cable address, Munday, Seattle. Code used, Bedford, McNell.]

"SEATTLE, WASH., May 6, 1910.

"REGISTER AND RECEIVER,

"U. S. Land Office, Juneau, Alaska.

"DEAR SIRS: I am the attorney for a number of coal entrymen in the Katalla region.

"Mr. Archie W. Shiels has been acting as the statutory agent for the purpose of filing the final proofs. Final payment was made on these claims on March 21st, 1910, and the receipts of the receiver for the amount paid were issued, which receipts I have just received from Mr. Shiels.

"They are numbered 4437 to 4446, inclusive; 4451 to 4461, inclusive; 4467 to 4470, inclusive, and 4474. These receipts, I take it, are simply formal receipts for the purchase price, and are not the final receipts or final certificates, which are issued as the basis of patent.

"Will you kindly advise me whether final receipts have been or will be issued in these cases, or whether you will be required to await instructions from the General Land Office before taking this action?

"Yours, truly,

CHAS. F. MUNDAY."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

33 That after the formation of said unlawful conspiracy, and in pursuance of and to effect the object of said unlawful conspiracy, the said Archie W. Shiels did knowingly, unlawfully, and corruptly, on, to wit, the twenty-first day of March, in the year of



our Lord nineteen hundred and ten, pay and cause to be paid to the receiver of the aforesaid United States land office at Juneau, in said District of Alaska, the sum of fifty-seven thousand nine hundred and fifty dollars in lawful money of the United States, as and for the purchase price then and there required by law to be paid to the United States, under certain applications then and there pending to enter and purchase certain, to wit, thirty-eight, of those certain coal claims hereinbefore mentioned and described, collectively known as the "Stracey Group" as aforesaid, said sum of money being the aggregate amount required by law as aforesaid to be paid as the purchase price for said thirty-eight coal claims; said applications to enter and purchase being applications purporting to have been made by and on behalf of certain individuals, each to purchase one of said coal claims, and the said applications to purchase having theretofore been made, in the form required by law, and in pursuance of and to effect the object of said unlawful conspiracy, and the names of said applicants to purchase, and the names of the coal claims so applied to be purchased by them, respectively, being as follows, to wit:

| Name of applicant. | Name of coal claim. |
|--------------------|---------------------|
| L. E. Barber       | L. E. Barber.       |
| R. S. Barber       | R. S. Barber.       |
| Fred H. Baxter     | Fred H. Baxter.     |
| Grant Calhoun      | Grant Calhoun.      |
| Scott Calhoun      | Scott Calhoun.      |
| A. L. Cohen        | A. L. Cohen.        |
| J. P. Conway       | J. P. Conway.       |
| R. S. Cox, jr.     | R. S. Cox, jr.      |
| 34 S. R. Davidson  | S. R. Davidson.     |
| Stacey B. Emens    | Stacey B. Emens.    |
| Walter S. Fulton   | Walter S. Fulton.   |
| A. C. Fry          | A. C. Fry.          |
| Izora V. Fry       | Izora V. Fry.       |
| J. D. Gardner      | J. D. Gardner.      |
| L. W. Haller       | L. W. Haller.       |
| Almira Hamilton    | Almira Hamilton.    |
| J. M. Hamilton     | J. M. Hamilton.     |
| P. A. Heney        | P. A. Heney.        |
| Homer M. Hill      | Homer M. Hill.      |
| R. C. Johnston     | R. C. Johnston.     |
| W. R. Johnston     | W. R. Johnston.     |
| J. B. Loughary     | J. B. Loughary.     |
| Horace Middaugh    | Horace Middaugh.    |
| A. C. Miller       | A. C. Miller.       |
| F. K. Munday       | F. K. Munday.       |
| P. A. Purdy        | P. A. Purdy.        |
| E. M. Ratcliffe    | E. M. Ratcliffe.    |
| Geo. M. Rice       | Geo. M. Rice.       |
| E. E. Siegley      | E. E. Siegley.      |
| Mabel A. Siegley   | Mabel A. Siegley.   |
| Chas. Stuver       | Chas. Stuver.       |
| Jessie M. Stuver   | Jessie M. Stuver.   |
| J. F. Trowbridge   | J. F. Trowbridge.   |
| M. F. Wight        | M. F. Wight.        |
| J. H. Yeates       | J. H. Yeates.       |
| C. A. McGregor     | Kentucky.           |
| H. R. Simpson      | Minnesota.          |
| Archie W. Shiels   | Mascot.             |

Against the peace and dignity of the United States of America and contrary to the form of the statute thereof in such case made and provided.

B. D. TOWNSEND,  
*Special Assistant to the Attorney General.*

ELMER E. TODD,  
*United States Attorney for the  
Western District of Washington.*

(Endorsed:) No. 1921. United States Circuit Court. Western District of Washington, Western Division. The United States vs. Charles F. Munday, Archie W. Shiels, and Earl E. Siegley. Indictment for vio. section 5440, R. S. A true bill. G. W. Ninemire, foreman grand jury.

35 (Further endorsed:) Presented to the court by the foreman of the grand jury in open court, in the presence of the grand jury, and filed in the U. S. Circuit Court October 12, 1910. A. Reeves Ayres, clerk, by Sam'l D. Bridges, deputy.

(Further endorsed:) Filed U. S. Circuit Court, Western District of Washington, November 5, 1910. A. Reeves Ayres, clerk; W. D. Covington, deputy.

UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

In the Circuit Court of the United States of America for the Western District of Washington, in the Ninth Circuit.

|  |             |
|--|-------------|
| THE UNITED STATES OF AMERICA, COMPLAINANT, | } No. 1921. |
| vs.  |             |
| CHARLES F. MUNDAY, ET AL., DEFENDANTS.     |             |

*Order of removal.*

This cause having come on for hearing upon the application of Charles F. Munday, represented by Messrs. Blaimé, Tucker & Hyland, and Earl E. Siegley, represented by Messrs. Kerr & McCord, for an order transferring said cause from the city of Tacoma, in said district, to the city of Seattle, in said district, for the convenience of the parties and witnesses, the United States Government being represented by Charles T. Hutson, Esq., assistant United States district attorney;

Now, therefore, it is ordered and adjudged that this cause be, and the same hereby is, removed from the city of Tacoma to the city of Seattle, in said district, and the clerk of said court at Tacoma  
36 is hereby directed to forthwith make up the record in said cause and transmit the same to the clerk of the said court at Seattle, Washington.

Done in open court this 31st day of October, 1910.

GEORGE DONWORTH, *Judge.*



(Endorsed:) No. 1921. In the Circuit Court of the United States for the Western District of Washington. United States of America, plaintiff, vs. Chas. F. Munday, et al., defendants. Certified copy of the order of removal. Filed U. S. Circuit Court, Western District of Washington, Nov. 5, 1910. A. Reeves Ayres, clerk; W. D. Covington, deputy.

37 UNITED STATES OF AMERICA,  
Western District of Washington, ss:

*Journal entries.*

TUESDAY, March 28, 1911.

Court met pursuant to adjournment. Present: Hon. C. H. Hanford, district judge; E. E. Todd, U. S. attorney; Joseph J. H. Jacoby, U. S. marshal; W. D. Covington, deputy clerk.

|  |   |                        |
|--|---|------------------------|
| UNITED STATES OF AMERICA, PLAINTIFF,   | } | No. 1921. Arraignment. |
| vs.                                    |   |                        |
| CHAS. F. MUNDAY, EARL E. SIEGLEY,      |   |                        |
| Archie W. Shiels, Algernon H. Stracey, |   |                        |
| defendants.                            |   |                        |

Now, on this 28th day of March, 1911, into open court, comes said defendants, Chas. F. Munday, accompanied by Messrs. Blaine, Tucker & Hyland, and Walter Fulton, Esq.; Earl E. Siegley, accompanied by Messrs. Kerr & McCord; and Archie W. Shiels, accompanied by Messrs. Dorr & Hadley, for arraignment, and each being asked if the name by which he is indicted is his true name, replies: "It is." Whereupon the reading of the indictment is waived and they separately enter their plea of "Not guilty" to the charges of the indictment against them.

|   |   |                  |
|---|---|------------------|
| UNITED STATES OF AMERICA, PLAINTIFF,        | } | No. 1921. Trial. |
| vs.   |   |                  |
| CHAS. F. MUNDAY, EARL E. SIEGLEY, ARCHIE W. |   |                  |
| Shiels, Algernon H. Stracey, defendants.    |   |                  |

Now on this 28th day of March, 1911, this cause comes on regularly for trial, in open court, the United States of America being represented by B. D. Townsend, Esq., and S. R. Rush, Esq., special assistants to the Attorney General; defendants being represented as follows: Chas. F. Munday by Messrs. Blaine, Tucker & Hyland, and Walter S. Fulton, Esq.; Earl E. Siegley by Messrs. Kerr & McCord; Archie W. Shiels by Messrs. Dorr & Hadley. The cause proceeds by the examination of jurors for cause until the hour of adjournment, at which time a jury not having been selected to try the cause, all parties consenting thereto, the further hearing of said cause is now adjourned until ten o'clock to-morrow morning,

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the 29th day of March, 1911. The jurors now in the box and those empaneled, and not yet called, after being duly admonished by the court, are allowed to separate until that hour. Whereupon court stands adjourned until to-morrow morning at ten o'clock.

C. H. HANFORD, *Judge.*

WEDNESDAY, *March 29, 1911.*

Court met pursuant to adjournment. Present: Hon. C. H. Hanford, district judge; E. E. Todd, U. S. attorney; Joseph J. H. Jacoby, U. S. Marshal; W. D. Covington, deputy clerk.

|  |                              |
|--|------------------------------|
| UNITED STATES OF AMERICA, PLAINTIFF,               | } No. 1921. Trial continued. |
| <i>vs.</i>   |                              |
| CHAS. F. MUNDAY, EARL E. SIEGLEY,                  |                              |
| Archie W. Shiels, Algernon H. Stracey, defendants. |                              |

And now the hour of ten o'clock a. m. having arrived, the United States of America, being represented by B. D. Townsend, Esq., and S. R. Rush, Esq., special assistants to the Attorney General; defendants being represented as follows: Chas. F. Munday by Messrs. Blaine, Tucker & Hyland and Walter S. Fulton, Esq.; Earl E. Siegley by Messrs. Kerr & McCord; Archie W. Shiels by Messrs. Dorr & Hadley; the cause proceeds by the further examination of jurors for cause, until all challenges have been exhausted. Whereupon counsel for plaintiff and defendants accepted the following 39 jurors, and they were sworn to try this cause: Chas E. Patten, Chas. S. Schroeder, Frank Mann, W. A. Faulds, Thos. O'Connor, Chas. B. Livermore, Geo. H. Lawson, W. A. Elder, C. I. Wannamaker, Valentine G. Armstrong, N. C. Strong, and Peter Funk.

Whereupon, after the first witness for the Government having been sworn, the counsel for the defendants move the court for a directed verdict.

And now, the hour of adjournment having arrived, by consent of parties it is ordered by the court that this cause be and is hereby continued until ten o'clock to-morrow morning, the 30th day of March, 1911; and the court having cautioned the jury in this case, they are allowed to separate until that hour.

Whereupon court stands adjourned until to-morrow morning at ten o'clock.

C. H. HANFORD, *Judge.*

THURSDAY, *March 30, 1911.*

Court met pursuant to adjournment. Present: Hon. C. H. Hanford, district judge; E. E. Todd, U. S. attorney; Joseph J. H. Jacoby, U. S. marshal; W. D. Covington, deputy clerk.

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*CHAS. F. MUNDAY, EARL E. SIEGLEY,  
Archie W. Shiels, Algernon H.  
Stracey, defendants.

No. 1921. Trial continued.

And now, the hour of ten o'clock a. m. having arrived, the United States of America being represented by B. D. Townsend, Esq., and S. R. Rush, Esq., special assistants to the Attorney General, defendants being represented as follows: Chas. F. Munday by Messrs. Blaine, Tucker & Hyland and Walter S. Fulton, Esq.; Earl E. Siegley by Messrs. Kerr & McCord; and Archie W. Shiels by  
40 Messrs. Dorr & Hadley; the jury being called, all answer to their names, all being present in their box, this case proceeds by further argument of counsel on motion for directed verdict.

And now the hour of adjournment having arrived, by consent of parties it is ordered by the court that this cause be and is hereby continued until ten o'clock to-morrow morning, the 31st day of March, 1911; and the court having cautioned the jury in this case they are allowed to separate until that hour.

Whereupon court stands adjourned until to-morrow morning at ten o'clock.

C. H. HANFORD, *Judge.*

FRIDAY, March 31, 1911.

Court met pursuant to adjournment. Present: Hon. C. H. Hanford, district judge; E. E. Todd, U. S. attorney; Joseph J. H. Jacoby, U. S. marshal; W. D. Covington, deputy clerk.

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*CHAS. F. MUNDAY, EARL E. SIEGLEY,  
Archie W. Shiels, Algernon H. Stracey, defendants.

No. 1921. Trial continued.

And now the hour of ten o'clock a. m. having arrived, the United States of America being represented by B. D. Townsend, Esq., and S. R. Rush, Esq., special assistants to the Attorney General; defendants being represented as follows: Chas. F. Munday, by Messrs. Blaine, Tucker & Hyland and Walter S. Fulton, Esq.; Earl E. Siegley by Messrs. Kerr & McCord; and Archie W. Shiels by Messrs. Dorr & Hadley; the jury being called, all answer to their names, all being present in their box; the counsel having indicated to the court  
41 that the argument would last more than the balance of the day and over Saturday, the 1st day of April, the court having duly cautioned the jury, excuses them until Monday at two o'clock, April 3rd, 1911; and thereafter the cause proceeds by the argument of counsel until the hour of adjournment, when it is ordered by the

court that this cause be and is hereby continued until to-morrow morning at ten o'clock.

Whereupon court stands adjourned until to-morrow morning at ten o'clock.

C. H. HANFORD, *Judge*.

SATURDAY, April 1, 1911.

Court met pursuant to adjournment. Present: Hon. C. H. Hanford, district judge; Hon. George Donworth, district judge; E. E. Todd, U. S. attorney; Joseph J. H. Jacoby, U. S. marshal; W. D. Covington, deputy clerk.

|  |                              |
|--|------------------------------|
| UNITED STATES OF AMERICA, PLAINTIFF,               | } No. 1921. Trial continued. |
| <i>vs.</i>   |                              |
| CHAS. F. MUNDAY, EARL E. SIEGLEY,                  |                              |
| Archie W. Shiels, Algernon H. Stracey, defendants. |                              |

And now the hour of ten o'clock a. m. having arrived, the United States of America being represented by B. D. Townsend, Esq., and S. R. Rush, Esq., special assistants to the Attorney General; defendants being represented as follows: Chas. F. Munday by Messrs Blaine, Tucker & Hyland and Walter S. Fulton, Esq.; Earl E. Siegley by Messrs. Kerr & McCord; and Archie W. Shiels by Messrs. Dorr & Hadley; the cause proceeds by further argument of counsel on motion for directed verdict until the close thereof, at which time the court takes the same under advisement.

And now the hour of adjournment having arrived, by consent of counsel it is ordered by the court that this cause be and is hereby continued until two o'clock Monday afternoon, the 3rd day of April, 1911.

Whereupon court stands adjourned until Monday morning at ten o'clock.

C. H. HANFORD, *Judge*.

MONDAY, April 3, 1911.

Court met pursuant to adjournment. Present: Hon. C. H. Hanford, district judge; Hon. George Donworth, district judge; E. E. Todd, U. S. attorney; Joseph J. H. Jacoby, U. S. marshal; W. D. Covington, deputy clerk.

|  |                              |
|--|------------------------------|
| UNITED STATES OF AMERICA, PLAINTIFF,                   | } No. 1921. Trial continued. |
| <i>vs.</i>   |                              |
| CHAS. F. MUNDAY, EARL E. SIEGLEY,                      |                              |
| Archie W. Shiels, and Algernon H. Stracey, defendants. |                              |

And now the hour of two o'clock p. m. having arrived, the United States of America being represented by B. D. Townsend, Esq., and S. R. Rush, Esq., special assistants to the Attorney General; defend-

ants being represented as follows: Chas. F. Munday, by Messrs. Blaine, Tucker & Hyland and Walter S. Fulton, Esq.; Earl E. Siegley, by Messrs. Kerr & McCord; and Archie W. Shiels, by Messrs. Dorr & Hadley; the jury being called, come and answer to their names, all being present in their box, this cause proceeds by the court overruling motion for directed verdict. Thereupon, at the request of counsel for Government, court adjourns until ten o'clock to-morrow morning, the 4th day of April, 1911; and the court having cautioned the jury in this cause they are allowed to separate until that hour.

Whereupon court stands adjourned until to-morrow morning at ten o'clock.

C. H. HANFORD, *Judge.*

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TUESDAY, April 4, 1911.

Court met pursuant to adjournment. Present: Hon. C. H. Hanford, district judge; E. E. Todd, U. S. attorney; Joseph J. H. Jacoby, U. S. marshal; W. D. Covington, deputy clerk.

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

CHARLES F. MUNDAY, EARL E. SIEGLEY,  
Archie W. Shiels, and Algernon H.  
Stracey, defendants.

} No. 1921. Trial concluded.

And now the hour of ten o'clock a. m. having arrived, the United States of America being represented by B. D. Townsend, Esq., and S. R. Rush, Esq., special assistants to the Attorney General; defendants being represented as follows: Chas F. Munday, by Messrs. Blaine, Tucker & Hyland and Walker S. Fulton, Esq.; Earl E. Siegley, by Messrs. Kerr & McCord; and Archie W. Shiels, by Messrs. Dorr & Hadley; the jury being called, come and answer to their names, all being present in their box, this cause proceeds by the court announcing an additional explanatory note to the decision of April 3rd, overruling motion of defendants for an instructed verdict.

The United States, through its counsel, moved the court that an order of nolle prosequi be entered as to the defendant, Earl E. Siegley, and it was so ordered by the court.

Thereupon the United States, through its counsel, made the following statement:

"That the record made here, and the decision rendered here, may be reviewed as speedily as possible by the Supreme Court, and the questions raised here may be settled for all time to come, the Government does now and here abandon for all time the charge in the indictment of the foreign or alien character of the Pacific Coal and Oil Company as an element of the crime sought to be charged by the indictment."

Thereupon the defendants Charles F. Munday and Archie W. Shiels, through their counsel, made the following motion:

"Defendants now move the court that the indictment be quashed and that the defendants be discharged upon the following grounds:

"1. That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the United States, nor with the violation of any law of the United States.

"2. That the said indictment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States.

"3. That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States.

"This motion is based upon the general grounds that the laws of the United States regulating the disposition of coal lands in the District of Alaska, during the times set forth in the indictment, did not prohibit the transactions, or any of them, charged in the indictment, as contemplated by and a part of the alleged conspiracy therein set forth."

Thereupon the United States, through its counsel, made the following motion:

"In order to obviate any question of double jeopardy, and for the purpose of making the record in such form that a writ of error will lie to the Supreme Court in favor of the Government under the act of March 2, 1907, the Government now moves that the  
45 court withdraw one of the jurors before ruling upon the motion just interposed on behalf of the defendants."

The defendants Charles F. Munday and Archie W. Shiels being personally present, thereupon consented to the withdrawal of the juror by the court, as requested by counsel for the Government, and Peter Funk, one of the jurors, was thereupon excused and withdrawn from the jury by the court.

Thereupon, and after one of the jurors had been excused and withdrawn as aforesaid, the following ruling, decision, and judgment was rendered by the court:

"The motion made on behalf of the defendants is granted by the court; the indictment is quashed and the defendants are discharged.

"It is therefore now considered, ordered, and adjudged by the court that the indictment in this cause be, and the same hereby is, quashed, and that said defendants Charles F. Munday and Archie W. Shiels, of and from the premises in said indictment specified be discharged and go hence hereof without day.

"It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment, pending the prosecution and determination of such writ of error, each of the defendants Charles F. Munday and Archie W. Shiels is hereby admitted to bail in the sum of two thousand five hundred dollars (\$2,500) upon his own recognizance, conditioned that he shall personally appear in this court on the first day of the next term thereof at Seattle, and from day to day and from term to term thereafter, and answer the indictment herein if the judgment herein shall be reversed by the said Supreme Court, and until such recognizances shall have been



46 duly executed and filed with the clerk of this court the existing recognizances now on file in this cause shall be and remain binding upon the defendants and their respective sureties.

"The foregoing ruling, decision, order, and judgment are based upon a construction of the coal-land laws of the United States, applicable to the District of Alaska, and the sole grounds thereof are set forth in the written opinion rendered by the court herein on the 3rd day of April, A. D. 1911, in ruling upon the motion and objection made by the defendants immediately after the first witness on behalf of the Government (C. B. Walker) was sworn and the first question was put to him by counsel for the Government."

To which ruling, decision, order, and judgment of the court and the rendition and entry thereof, and each and every part thereof, and particularly to the parts thereof so, for the reasons and upon the grounds aforesaid, quashing the said indictment and adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day, the United States, through its counsel, duly excepts, which exception is allowed by the court.

Whereupon the eleven remaining jurors are discharged from further consideration of this cause.

C. H. HANFORD, *Judge*.

47 UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

In the Circuit Court of the United States of America for the Western  
District of Washington.

THE UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

CHARLES F. MUNDAY, ARCHIE W. SHIELS, EARL E.  
Siegley, and Algernon H. Stracey, defendants.

} No. 1921.

*Bill of exceptions.*

THE UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

Be it remembered that on the 28th day of March, A. D. 1911, in this cause, the defendants Charles F. Munday, Archie W. Shiels, and Earl E. Siegley were duly arraigned, and each of said defendants thereupon entered a plea of not guilty to the indictment herein;

Thereupon said cause was duly moved for trial by and on behalf of the plaintiff, the United States of America, B. D. Townsend, and S. R. Rush, special assistants to the Attorney General, appearing as attorneys for the United States, and E. F. Blaine, Wilmon Tucker, Ivan L. Hyland, Walter S. Fulton, and E. C. Hughes appearing as attorneys for the defendant Charles F. Munday; C. W. Dorr and H. E.

Hadley appearing as attorneys for the defendant, Archie W. Shiels; and J. A. Kerr and E. S. McCord appearing as attorneys for the defendant Earl E. Siegley;

Thereupon and on said 28th day of March, A. D. 1911, and the 29th day of March, A. D. 1911, a jury was duly selected, empaneled, and sworn to try said cause;

Thereupon and on said 29th day of March, A. D. 1911,  
48 an opening statement was made on behalf of the United States:

Thereupon and on said 29th day of March, A. D. 1911, the following proceedings were had in said cause:

C. B. Walker was called and duly sworn to testify as a witness on behalf of the United States. The following question was propounded to him by counsel for the Government:

"What official position do you hold?"

Thereupon counsel for defendants interposed the following motion and objection:

"On behalf of each of the defendants, we now formally object to the introduction of any evidence in this case for the reason and upon the grounds, all of which affirmatively appear:

"1. That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the United States, nor with the violation of any law of the United States.

"2. That said indictment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States.

"3. That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States.

"4. That if any crime or offense is charged by the indictment, the prosecution thereof was barred by the statute of limitations before the indictment in this case was found or presented.

"5. That it necessarily appears from the indictment and the  
49 opening statement of the Government, that no conviction can be had in this case.

"6. Wherefore the defendants, and each of them, now move the court to instruct the jury to return a verdict of not guilty as to the defendants and each of them."

Thereafter and on said 29th day of March, and on the 30th and 31st days of March and the 1st day of April, A. D. 1911, the issues and questions of law raised by said motion and objection were argued and presented to the court by the attorneys for the respective parties, and on said 1st day of April, A. D. 1911, were submitted to the court, and were taken under advisement by the court until 2 o'clock p. m. on the 3rd day of April, A. D. 1911, to which time an adjournment of the trial of such cause was had.

Upon said 3rd day of April, A. D. 1911, at 2 o'clock p. m., the court rendered a decision and ruling upon said motion and objection, which decision was in writing, and contained all of the grounds and



reasons upon which said decision and ruling were based, and which said decision and ruling is as follows, to wit:

50 "The Government prosecutes the defendants by an indictment founded upon section 5440 of the Revised Statutes of the United States, charging them as criminal conspirators. A jury having been impaneled and sworn to try the case, counsel for the Government made an opening statement, giving an outline of the facts which the Government relies upon to sustain the charge. His statement, however, consisted of a mere reading of the indictment. After a witness had been called and sworn to testify, counsel for the defendants interposed an objection to the introduction of any evidence on the ground, as they allege, that the indictment is insufficient to support a judgment adverse to their clients, and by arguments supporting their objection they have presented the concrete question whether the conspiracy charged is criminal or innocent.

"In the consideration and decision of the question submitted it will be assumed that the indictment is a fair and complete statement of the Government's case—that is to say, it specifies the crime intended to be charged with definiteness and certainty and contains a general outline of the chain of circumstances and the facts which the evidence to be offered will prove, or tend to prove.

#### "ELEMENTS OF CRIMINAL CONSPIRACY.

"The only crimes punishable, under Federal law, are those defined by the laws enacted by Congress; therefore it must be kept in mind that the prosecution in this case is for an alleged statutory crime. The elements of the crime of conspiracy under the laws of the United States are:

"1. An object to be accomplished which must be—

"(a) The commission of an offence against the United States;

51 "(b) To defraud the United States.

"2. A plan or scheme embodying means to accomplish the object.

"3. An agreement or understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme—or by any effectual means.

"4. An overt act by one or more of the conspirators to effect the object of the conspiracy.

#### "THE INDICTMENT ANALYZED.

"The indictment names the three defendants on trial and one Algernon H. Stracey as the persons implicated in the conspiracy charged.

"King County, in the State of Washington, and the 1st day of May, 1905, are specified as the place and time of the formation of the alleged criminal combination.

"The general charge of the indictment is that the four persons named, with divers other unknown persons, did unlawfully (omitting other adjectives), combine, confederate, and agree together to defraud the United States of America of the use and possession of and title to large tracts of valuable coal lands then and there part of the public domain of the United States situated within the Kayak recording district of Alaska, being contiguous tracts and parcels of coal lands collectively and commonly known as the 'Stracey Group.'

"The indictment specifies that the lands referred to were subject to location and entry under the coal-land laws of the United States applicable to Alaska, and subject to the several attempted locations and entries in a subsequent part of the indictment specified, 52 except for the unlawful, fraudulent, false, feigned, and fictitious character of said attempted locations and entries; and that the value of said lands is ten million dollars.

"The indictment contains other specifications of the nature of the intended fraud, some of which, however, are comprehended within the general charge of the purpose to defraud the United States by divesting the Government of its title to, and proprietary rights in, the coal lands designated, and therefore do not merit additional mention.

"Other specifications of fraud are to the effect that the scheme included interference with the administration of the land business of the United States by deceiving the officers and agents of the Government, in order to induce them to approve the several locations and entries and issue patents conveying the title to the coal lands designated.

"The gravamen of the charge is an unlawful conspiracy to obtain coal land in Alaska for the Alaska Development Company, a corporation of the State of Washington, and the Pacific Coal & Oil Company, reputed to be a corporation organized and existing under the legal authority of some foreign government, to wit, the Dominion of Canada or one of its Provinces, the quantity of land so to be obtained for said corporations being in excess of the quantity which the law permits.

"The several tracts of coal land to be acquired pursuant to the alleged conspiracy are forty in number, each being specifically described and identified as a coal claim, bearing the name of the individual, locator, and claimant thereof, and by a serial number and by the area thereof expressed in acres and fractions of an acre, 53 each claim being approximately  $\frac{1}{4}$  of a section.

"The plan or scheme embodying the means whereby the object of the alleged conspiracy was to be accomplished are set forth with particularity in articulated paragraphs which I have epitomized as follows:

"The objects and purposes of said unlawful conspiracy were to be furthered and effected by means of unlawful, fraudulent, false, feigned, and fictitious locations, notices of locations, preferential rights to purchase, applications to enter and purchase, and final

entries and purchases under the coal-land laws of the United States; by cunning persuasion and promises of pecuniary reward and other corrupt means persons severally qualified by law (except as stated) should be procured and induced to make the fictitious locations and fraudulent entries of said tracts of coal lands ostensibly for the exclusive use and benefit of themselves respectively, but in truth and in fact for the use and benefit of the Alaska Development Company and the Pacific Coal & Oil Company; the possession of all of said coal lands was to be held and the use thereof enjoyed by persons ostensibly as the agents of, and for the benefit of the individual claimants, respectively, but in truth and in fact as the agent of and for the use and benefit of said corporations; each claimant should be induced, persuaded, and procured to support his unlawful location and fraudulent entry by affidavits regular in form but containing false representations; that each of them, respectively, had opened and improved a coal mine and expended moneys in that behalf and staked out and located a coal claim including within its boundaries said coal mine, and had taken and held possession of said coal claims

and intended to purchase from the United States under  
 54 and pursuant to the coal-land law applicable to Alaska the tract of land so pretended to have been located. By said means the officers of the United States having charge of public-land matters should be deceived and induced to accept, file, and record notices of location and affidavits in the land office, and to segregate said coal lands from the public domain and withdraw the same from public entry under any of the public-land laws of the United States, and rights should thereby be acquired, ostensibly for the benefit of the persons making such false affidavits, but in fact for the said corporations. Thereafter said coal-land claimants, respectively, should hold and exercise their pretended and unlawful preferential rights to purchase said coal lands, ostensibly for their own use and benefit, but in fact for the said two corporations. Thereafter said claimants should, in the form and manner provided by law, make applications to enter and purchase said coal lands, ostensibly for their own use and benefit, but in fact for the said two incorporations, and thereby the said corporations should receive and enjoy the benefits of a greater number of locations and entries of coal lands and for a greater quantity of coal lands than allowed by law. The respective shares and interests of said Alaska Development Company and of said Pacific Coal & Oil Company in the fruits and benefits of the unlawful conspiracy were to be adjusted so that said Alaska Development Company should receive and enjoy the title, use, and value of all of said coal lands, subject to a contract entered into between said two corporations prior to the transactions, and which was in full force and effect at and during all of the times mentioned, by

which it was provided that, as between said corporations, the  
 55 Pacific Coal & Oil Company should be entitled to take and hold possession of said coal lands, operate the mines thereon, and extract the coal therefrom, paying a royalty therefor to said

Alaska Development Company, and have an option to purchase all of said coal lands within certain stated times and for certain stated prices.

"Overt acts are charged, substantially, as follows:

"That after the formation of said unlawful conspiracy, and in pursuance of and to effect its object, Archie W. Shiels, one of the defendants, did unlawfully on specified dates cause each of the said coal claims to be surveyed by a mineral surveyor of the United States. Said survey being intended for use in applications to enter and purchase the said coal claims by the respective claimants thereof, and thereafter in further pursuance of and to effect the object of said unlawful conspiracy, the said Shiels did knowingly on specified dates file and cause to be filed in the office of the surveyor general of the United States for Alaska each and all of the said official surveys and the field notes thereof. The indictment then sets forth in tabulated form a list of the claims surveyed, with the dates on which the surveys were made and the filing dates, said claims being forty in number and identified by the names of the claimants as the same claims previously mentioned. The indictment then alleges a number of other overt acts in furtherance of and to consummate the conspiracy indicating that the scheme was carried out to the extent of filing applications to purchase said claims by each of the locators and payment of the Government's price to the officers of the local land office

for the District of Alaska, in which the lands are situated, and  
56 that in the transaction of said business the defendants, or one of them, acted as attorney or agent of all of the locators. The indictment alleges other transactions subsequent to the first day of January, 1910, including written communications referring to money advanced by the Pacific Coal and Oil Company, for which security was to be taken in the form of mortgages to be executed by the several entrymen and payments of money to the receiver of the land office at Juneau, in payment of the Government price for a number of said coal claims. Finally the indictment charges that on a specified date, subsequent to January 1, 1910, one of the defendants paid to the receiver of the land office at Juneau the Government price for thirty-eight of said coal claims.

"It is to be specially noted that the indictment does not charge that the several locators were dummies; on the contrary, it is expressly averred that they were each of them competent to make entries of coal lands in Alaska, and not disqualified except for particular reasons in the indictment specified, and it is not charged as one of those particular reasons that their locations were illegal because of any failure to do the things which the law makes essential to the acquisition of rights as locators of coal land, nor that more than one coal right was to be or had been exercised by any one locator.

"To avoid possible complications from the enactment of the Criminal Code, which went into effect on the 1st day of January, 1910, counsel for the Government voluntarily announced an abandonment by the Government of the charges contained in the indictment of

over acts subsequent to that date as elements of the crime with which the defendants are charged.

57 "PROVISION OF THE STATUTE AFFECTING COAL CLAIMS IN ALASKA.

"For convenience of reference, I will use Pierce's Federal Code, being a compilation of all the statutes of the United States of a general and permanent nature in force March 4, 1907, with a supplement continuing the compilation to January 1, 1910. In this volume the coal-land laws of the United States necessary to be considered in the determination of the question—whether the defendants intended or attempted to perpetrate a fraud—are set forth in a group in sections numbered consecutively from 10044 to 10054, inclusive. The same being an accurate reprint of the laws comprised in sections 2347 to 2352 of the Revised Statutes of the United States, and in 31 U. S. Stat. at L., p. 658, and in 33 U. S. Stat. at L., p. 525. Sections 10044 to 10049, inclusive, being identical with sections 2347 to 2352, inclusive, of the Revised Statutes comprise the general coal-land law of the United States enacted by Congress in the year 1873. Referring to the sections by the code numbers, the statutes contain the following provisions:

"Section 10044 prescribes a rule for the acquisition from the Government of coal lands being part of the public domain of the United States, by cash entry. By said rule the right to make entries is limited to persons and associations whose qualifications are defined in the following words: 'Every person above the age of twenty-one years who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally

58 qualified as above.' And the maximum quantity of coal land which may be entered by a single individual or an association is fixed, and the minimum price to be paid therefor is also fixed.

"Section 10045 provides for a preference right of entry in favor of any person or association of persons severally qualified as provided in the preceding section who have opened and improved, or shall open and improve, any coal mine or mines on the public lands and shall be in actual possession of the same, and further provides that when any association not less than four persons, severally qualified as above, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

"Section 10046 relates to the presentation of claims for preferential rights and details of procedure to secure the same.

"Section 10047 reads as follows:

"The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken



the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.'

"Section 10048 relates to conflicting claims upon coal lands on which improvements shall have been commenced.

"Section 10049 is a saving clause of rights which may have attached prior to the enactment of the law.

59 "Section 10050 is the act of Congress approved June 6, 1900, extending to the District of Alaska, so much of the public land laws of the United States as relate to coal lands, namely, sections 2347 to 2352, inclusive, of the Revised Statutes.

"Sections 10051-10054, inclusive, comprise the act of Congress approved April 28, 1904, entitled, 'An act to amend an act entitled "An act to extend the coal-land laws to the District of Alaska," approved June sixth, nineteen hundred,' which reads as follows:

"'10051. That any person, or association of persons, qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

"'10052. SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated, an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor general for the District of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the District of Alaska published nearest the



location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until  
 60 after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: Provided, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

"10053. SEC. 3. That during such period of posting and publication, or within six months thereafter, any person, or association of persons, having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased, shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

"10054. SEC. 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the District of Alaska."

"The statute comprised in these four quoted sections is specially applicable to Alaska and was enacted by Congress to meet an urgent demand, amounting to necessity, and because the previous statute of June 6, 1900, extending the general coal-land law of the United States to Alaska was impracticable because conditions made it impossible to acquire any rights under it by compliance with its requirements.

"In a letter addressed to the registers and receivers in the District of Alaska, dated June 27, 1900, the Commissioner of the General Land Office announced the enactment of this law, and explained that under sections 2347 to 2352, inclusive, of the Revised Statutes, which the act purported to extend to Alaska, coal-land filings and entries must be by legal subdivisions as made by the regular United States survey; and that under section 2401 of the Revised Statutes, as amended by the act of August 20, 1894, no application for a special  
 61 survey shall be granted unless the township proposed be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys; and that as no township or subdivisional surveys have been made nor any standard lines or bases for township and subdivisional surveys established within Alaska, therefore until the filing in the local land office of the official plat of survey of a township, no coal filing nor entry can be made. This was in fact an official declaration of the attempt, and failure of Congress to

make provision, by a practicable law, for the acquisition by individuals and associations of rights in and to coal lands in Alaska.

"Instead of attempting to state the provisions of the law of 1904 in different phraseology, I have quoted it because it is the opinion of the court that it is not in any particular ambiguous. It means what the words selected by Congress express according to the common and general understanding of people accustomed to use the English language. It needs not to be construed, and there is no authority to interpolate into its provisions restrictions and limitations of rights which it grants, by judicial interpretation or construction. In the case of *Newhall v. Sanger* (92 U. S., 765), Mr. Justice Davis said: 'There is no authority to import a word into a statute in order to change its meaning.'

"By the arguments made, it appears that this prosecution is founded, in part at least, upon a theory that the restrictions of section 10047 above quoted are to be deemed as being imported into the law of 1904. That contention is untenable for the reason that by the express words of that section which I have quoted those restrictions apply only to persons and associations claiming  
62 or exercising rights under the three preceding sections, which were and are inapplicable to conditions in Alaska and never did have potential force there. The statute of 1904 applicable only to Alaska is a declaration of the will of Congress subsequent to the act of June 6, 1900, extending the law of 1873 to Alaska, and therefore is the paramount law. The later law does not in words nor by reference to and adoption of the provisions of the older law, restrict persons or associations to a single exercise of the right granted to locate coal claims and secure patents therefor. The argument that section 10047 must be read into the Alaska statute is that the right to locate is given only to persons and associations qualified to make entry under the coal-land laws of the United States, and that these words exclude persons and associations having the qualifications prescribed, but disqualified, by reason of having once exercised the right. By this argument there is interpolated into the statute words additional to and expressing a meaning different from the plain declaration of the law itself. The prescribed qualifications are age and citizenship. By the law of 1873 a person twenty-one years of age and a citizen of the United States is qualified to make an entry of coal land, and having the same qualifications and having, also, opened or improved a coal mine on unsurveyed public land in Alaska, he is entitled to become a locator of a coal claim including the mine which he has opened or improved. This is so according to the letter of the law. And having located a coal claim, he may sell it and his vendee, if a citizen of the United States or an association composed of citizens, are entitled to receive a patent conveying the  
63 complete title from the Government by compliance with the requirements of section 10052. To say that a vendee of a qualified locator, to be entitled to receive a patent, must be a citizen or association of citizens qualified as prescribed to make an

entry of coal land, and not disqualified by having exercised a right to acquire coal land from the Government, infringes legislative power, for, in the guise of construction, a radical change in the law would be effected by the addition of requirements and restrictions which the law-making power did not put there. The words of the law are: 'That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, \* \* \*.' By having made citizenship a requisite condition of the right to receive a patent the law makes citizenship the only requisite condition to the right. This is so by the rule declared by the Supreme Court in the words of Mr. Justice Davis above quoted, which is a fundamental rule for the construction and interpretation of statutes. *Expressum facit cessare tacitum*.

"Congress intended to enact a practicable, workable law, and if its second attempt to do so be not made futile by misconstruction, we have such a law. It is not a law made to serve the purpose of monopolists who would keep the coal of Alaska locked up within her mountain walls, nor is it based upon any fantastic notion that trusts can be annihilated by giving coal rights to no one except the man who by personal toil may dig the coal and carry it to market upon his back or upon his head. It is the duty of the court to not misconstrue the law, nor stigmatize the Congress which enacted it and the President who approved and signed it, by imputing to them a lack of either sense or honesty. This law by its words and intendment limits

64 the rights of a qualified locator who has opened or improved a coal mine in Alaska by prescribing the maximum area and the form of the tract which he may secure by doing the things which the law exacts; and by making the opening or improving of a coal mine, the initiatory step and the marking of boundaries and corners, and the posting and recording of notices essential to a valid location. These requirements necessitate expense and trouble, and it is not for the court to say that as restrictions and limitations they are not sufficient. The responsibility of determining all such questions belongs to the legislative branch of the Government. To become entitled to a patent the locator or his assigns must publish and keep posted the notice prescribed by the second section of the act and furnish proof of such publication and posting, 'and such other proof as is required by the coal-land laws.' We now look to the coal-land laws to find what other proof must be furnished. We search the law to find what other proofs are required rather than regulations promulgated by departmental officers, because the words of the act refer to the law, and do not leave the locator who has opened and improved a coal mine under the necessity of complying with the personal will of bureau officers authorized to change the regulations as often as they may think that they discover reasons for more exacting conditions. Section 10047 of the code contains this clause, 'all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon \* \* \*.' This is undoubtedly the other proof referred

to, and by the selection and adoption of that particular clause there is plainly manifested a definite purpose to not graft the other provisions of the same section upon the Alaska coal-land laws.

65 Locators of coal claims in Alaska, under this law, have the right to use business sense, to look ahead and make arrangements for working capital, and to contract in advance for transportation facilities, and to sell or mortgage their claims. By mandatory words the law prescribes that the locator who meets the requirements prescribed shall receive a patent. He may sell his claim before obtaining the patent, and if he does so his vendee, if a citizen of the United States or an association of citizens, shall receive the patent. It is not to be inferred that the law will permit the acquisition of coal lands in Alaska through the medium of dummy entrymen. In land-office practice dummies are either fictitious persons or those who, having no interest in the transaction, permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfunctorily. A man who opens or improves a coal mine in Alaska and locates a claim in the form prescribed by the statute, including his improvements, and marks its lines and corners so that its boundaries can be readily traced on the ground, and posts and records a notice in conformity to the requirements of the statute, and is then competent and entitled to deal with the claim as his own property, to sell it, lease it, mortgage it, or keep it, and derive for himself all the profits and benefits to be derived from the most advantageous use or disposition of such property, is not a dummy entryman.

"This understanding of the law does not make it inconsistent with its title. It is an amendatory statute. It amends not by changing any provision of previously enacted laws, but by making additions thereto especially applicable to local conditions in Alaska.

66 This appears the more obvious when all of the laws affecting the acquisition of rights to coal lands are grouped in chronological order as they appear in Pierce's Federal Code.

"Nothing is to be implied from the peculiar phraseology of the 4th and last section. By its words all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the District of Alaska. This continues the existing status as to all the provisions of the coal-land laws of the United States not in conflict with the new enactment. If there be conflicting provisions the older enactments yield to the new. Provisions which do not conflict continue in force, and when conditions shall be changed so that their requirements may be complied with, it will be legal and practicable to make cash entries and acquire preferential rights.

"A foreign corporation can not lawfully acquire or hold a coal claim in Alaska either in its corporate name nor in the name of any agent or trustee. Therefore, for the reason that the indictment charges a conspiracy to acquire coal claims or proprietary rights to coal claims in Alaska for a foreign corporation, it must be sustained as a valid indictment, and the objection to the introduction of evi-

dence must be overruled. The court will, however, instruct the jury that to justify a conviction of the defendants under it the evidence must prove that the object of the conspiracy, if any, must have been to perpetrate a fraud by securing coal claims or proprietary rights in coal claims in Alaska for the Pacific Coal & Oil Company."

67 After said decision and ruling were rendered as aforesaid, the United States, by its counsel, then and there duly excepted to so much thereof as limited the United States to proof that the object of the conspiracy charged in the indictment was to perpetrate a fraud by securing coal claims or proprietary rights in coal claims in Alaska for the Pacific Coal and Oil Company, an alien corporation, and also excepted to said decision and ruling in so far as the same held and ruled that the indictment did not charge an offense under the laws of the United States, except a conspiracy to secure coal lands, and the title thereto, for the use and benefit of an alien, which said exceptions were duly allowed and noted.

Thereupon further proceedings in said cause were adjourned until April 4, A. D. 1911, at 10 o'clock a. m., at which time the trial of said cause was resumed, and the following proceedings therein were had:

The United States, through its counsel, moved the court that an order of nolle prosequi be entered as to the defendant, Earl E. Siegley, and it was so ordered by the court.

Thereupon the United States, through its counsel, made the following statement:

"That the record made here, and the decision rendered here, may be reviewed as speedily as possible by the Supreme Court, and the questions raised here may be settled for all time to come, the Government does now and here abandon for all time the charge in the indictment of the foreign or alien character of the Pacific Coal and Oil Company as an element of the crime sought to be charged by the indictment."

68 Thereupon the defendants, Charles F. Munday and Archie W. Shiels, through their counsel, made the following motion:

"Defendants now move the court that the indictment be quashed and that the defendants be discharged upon the following grounds:

"1. That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the United States, nor with the violation of any law of the United States.

"2. That the said indictment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States.

"3. That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States.

"This motion is based upon the general grounds that the laws of the United States regulating the disposition of coal lands in the District of Alaska, during the times set forth in the indictment, did not prohibit the transactions, or any of them, charged in the indictment, as contemplated by and a part of the alleged conspiracy therein set forth."



Thereupon the United States, through its counsel, made the following motion:

"In order to obviate any question of double jeopardy, and for the purpose of making the record in such form that a writ of error will lie to the Supreme Court in favor of the Government, under the act of March 2, 1907, the Government now moves that the court withdraw one of the jurors before ruling upon the motion just interposed  
69 on behalf of the defendants."

The defendants Charles F. Munday and Archie W. Shiels being personally present, thereupon consented to the withdrawal of the juror by the court, as requested by counsel for the Government, and Peter Funk, one of the jurors, was thereupon excused and withdrawn from the jury by the court.

Thereupon, and after one of the jurors had been excused and withdrawn as aforesaid, the following ruling, decision, and judgment was rendered by the court:

"The motion made on behalf of the defendants is granted by the court; the indictment is quashed and the defendants are discharged.

"It is therefore now considered, ordered, and adjudged by the court that the indictment in this cause be, and the same hereby is, quashed, and that said defendants Charles F. Munday and Archie W. Shiels of and from the premises in said indictment specified be discharged and go hence hereof without day.

"It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment, pending the prosecution and determination of such writ of error, each of the defendants Charles F. Munday and Archie W. Shiels is hereby admitted to bail in the sum of two thousand five hundred dollars (\$2,500) upon his own recognizance, conditioned that he shall personally appear in this court on the first day of the next term thereof at Seattle, and from day to day and from term to term thereafter, and answer the indictment herein if the judgment herein shall be reversed by the said Supreme Court, and until such recognizances shall have been  
70 duly executed and filed with the clerk of this court the existing recognizances now on file in this case shall be and remain binding upon the defendants and their respective sureties.

"The foregoing ruling, decision, order, and judgment are based upon a construction of the coal-land laws of the United States applicable to the District of Alaska, and the sole grounds thereof are set forth in the written opinion rendered by the court herein on the 3rd day of April, A. D. 1911, in ruling upon the motion and objection made by the defendants immediately after the first witness on behalf of the Government (C. B. Walker) was sworn and the first question was put to him by counsel for the Government."

(Which said written opinion so referred to by the court is the opinion and decision hereinbefore set forth in full.)

To which ruling, decision, order, and judgment of the court and the rendition and entry thereof, and each and every part thereof, and



particularly to the parts thereof so, for the reasons and upon the grounds aforesaid, quashing the said indictment and adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day, the United States, through its counsel, duly excepts, which exception is allowed by the court.

And forasmuch as the foregoing matters do not appear of record, the United States tenders this its bill of exceptions, and prays that the same may be signed and duly authenticated and made a part of the record herein, which is accordingly done this 10th day of April, A. D. 1911.

C. H. HANFORD, *District Judge.*

71 Service of the foregoing bill of exceptions is admitted this 10th day of April, A. D. 1911.

E. C. HUGHES, WILMON TUCKER &  
WALTER S. FULTON,

*Attorneys for Charles F. Munday.*

C. W. DORR and H. E. HADLEY,

*Attorneys for Archie W. Shiels.*

(Endorsed:) No. 1921. In the Circuit Court of the United States for the Western District of Washington. The United States of America v. Charles F. Munday et al. Bill of exceptions. Filed, U. S. Circuit Court, Western District of Washington, April 10, 1911, 4.15 p. m. Sam'l D. Bridges, clerk; W. D. Covington, deputy.

72 UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

In the Circuit Court of the United States within and for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,  
*vs.*

CHARLES F. MUNDAY, ARCHIE W. SHIELS, EARL E. Siegley, and Algernon H. Stracey, defendants. } No. 1921.

*Petition for writ of error.*

And now comes the United States, plaintiff herein, and says that on the fourth day of April, A. D. 1911, this court made its decision and judgment in favor of the defendants Charles F. Munday and Archie W. Shiels and against the plaintiff the United States of America, holding insufficient and quashing the indictment in this cause, and ordering that the defendants Charles F. Munday and Archie W. Shiels be discharged, in which decision and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff and of such a character as to entitle this plaintiff, under the law, to review the said judgment

and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

73 Dated April 10, A. D. 1911.

B. D. TOWNSEND,  
*Special Assistant to the Attorney General.*  
S. R. RUSH,  
*Special Assistant to the Attorney General.*

UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

It is further ordered that the foregoing allowance of said writ of error shall operate as a supersedeas in said cause, and that the said defendants and each of them be and they are hereby admitted to bail on their own recognizances, respectively, in the sum heretofore fixed by the court.

Dated Seattle, Washington, April 10, A. D. 1911.

C. H. HANFORD, *District Judge.*

(Endorsed:) No. 1921. In the Circuit Court of the United States for the Western District of Washington. The United States of America v. Charles F. Munday et al. Petition for writ of error. Filed, U. S. Circuit Court, Western District of Washington, Apr. 10, 1911, 4.19 p. m. Sam'l D. Bridges, clerk; W. D. Covington, deputy.

74 UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

In the Circuit Court of the United States within and for the Western District of Washington, Northern Division.

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| THE UNITED STATES OF AMERICA, PLAINTIFF,  | } No. 1921. |
| v.  |             |
| CHARLES F. MUNDAY, ARCHIE W. SHIELDS, EARL E. Siegley, and Algernon H. Stracey, defendants. |             |

*Assignment of errors.*

Comes now the United States of America, plaintiff in the above-entitled cause, and files this assignment of errors to the judgment

heretofore entered by the Circuit Court for the Western District of Washington, Northern Division, in the above-entitled cause, to wit:

First. The Circuit Court for the Western District of Washington erred in sustaining the motion of the defendants that the indictment be quashed and that the defendants be discharged, and in rendering judgment for the defendants.

Second. The said Circuit Court erred in sustaining the said motion and rendering the said judgment upon, and because of, an erroneous construction of section 5440 of the Revised Statutes as amended (21 Stat., 4), whereby the said Circuit Court in substance and effect held that the scheme and conspiracy in the indictment described would not, if carried out, defraud the United States within the meaning of that statute, although such scheme and conspiracy contemplated and intended, and if consummated necessarily involved, the obtaining from the United States of the use and possession of, and title to, valuable coal lands for the use and benefit of

75 the Alaska Development Company and the Pacific Coal and Oil Company in a quantity greatly in excess of that allowed by law, and this result was to be accomplished by hiring and procuring divers persons to make locations and entries of coal lands ostensibly for their own use and benefit, but in fact as the agents and for the sole use and benefit of said Alaska Development Company and Pacific Coal and Oil Company; as to all of which facts the officers of the Land Department of the United States were to be deceived through false and fraudulent representations of material facts and fraudulent concealment of material facts, thereby creating false and deceptive appearances, all tending (and by the conspirators designed) to induce such officers to believe to be lawful and bona fide, and therefore to act favorably upon locations, preferential rights to purchase, and applications to enter and purchase coal lands, which in fact would be fraudulent and unlawful.

Third. The said Circuit Court erred in sustaining the said motion and rendering the said judgment upon, and because of, an erroneous construction of the act of Congress approved April 28, 1904 (33 Stat., 525), whereby the said Circuit Court in substance and effect held that the scheme and conspiracy described in the indictment would not, if carried out, be in violation of the provisions of said last-mentioned statute, and therefore constitute a fraud upon the United States; this specification of error is based upon the general grounds stated in the last preceding specification of error.

Fourth. The said Circuit Court erred in its construction of 76 said act of April 28, 1904, in holding that said act does not in words nor by reference adopt, as a part of said statute, the restrictions and qualifications prescribed by section 2350, R. S., being section 4 of the act of March 3, 1873 (17 Stat., 607), and particularly the provisions of said last-described statute prohibiting the making of more than one entry of coal lands by or on behalf of any person or association of persons, and prohibiting the enjoyment of

the benefits of more than one location or entry of coal lands by or on behalf of any person or association of persons.

Fifth. The said Circuit Court erred in its construction of said act of April 28, 1904, in holding that section 4 thereof did not enact and adopt as a part of said statute the restrictions and qualifications prescribed by section 4 of said act of March 3, 1873, referred to in the last preceding specification of error.

Sixth. The said Circuit Court erred in its construction of said act of April 28, 1904, in holding that the provisions of section 1 of said act, providing in substance that locations upon unsurveyed coal lands in Alaska could be made only by persons or associations of persons qualified to enter coal lands under the coal-land laws of the United States, has reference only to the age and citizenship (or declaration to acquire citizenship) of the locator, section 4 of said act of March 3, 1873 (section 2350, R. S.), expressly providing that all persons and associations of persons should be disqualified from making more than one entry of coal lands and from enjoying the benefits of more than one entry of coal lands.

Seventh. The said Circuit Court erred in its construction of said act of April 28, 1904, mentioned in the last preceding specification  
77 of error, in refusing and omitting to follow and apply the decision of the Supreme Court of the United States in *United States v. Keitel* (211 U. S., 370), wherein it was expressly held that a person or association of persons is disqualified to make more than one entry of coal lands or to enjoy the benefits of more than one entry of coal lands.

Eighth. The said Circuit Court erred in its construction of said act of April 28, 1904, in holding that citizenship is the only qualification required to entitle a person or association of persons to make application for and receive a patent to coal lands under said act.

Ninth. The said Circuit Court erred in its construction of said act of April 28, 1904, in holding that a person or association of persons is not disqualified to enter and purchase coal lands by having once exercised the right to purchase coal lands from the Government.

Tenth. The said Circuit Court erred in its construction of said act of April 28, 1904, in holding in substance and effect that after a person had made a valid location upon coal lands he may sell said coal lands, and his vendee, if a citizen of the United States or an association composed of citizens, is entitled to receive a patent conveying the complete title from the Government by compliance with section 2 of said act of April 28, 1904, even though said vendee had previously exercised (and thus exhausted) the right to enter and purchase coal lands from the Government.

Eleventh. The said Circuit Court erred in its construction of said act of April 28, 1904, in holding in substance and effect that a location upon coal lands creates an interest and estate in said lands in favor  
of the locator, and which may be sold and conveyed.

Twelfth. The said Circuit Court erred in its construction of  
78 said act of April 28, 1904, referred to in the last preceding specification of error, in refusing and omitting to apply and follow

the decision of the Supreme Court of the United States in United States v. Forrester (211 U. S., 394), wherein it was expressly held that a preferential right to purchase coal lands, acquired by location, is not an estate or interest in the lands located.

Thirteenth: The said Circuit Court erred in its construction of said act of April 28, 1904, and said act of March 3, 1873, in holding in substance and effect that the restrictions and qualifications prescribed by section 4 of said act of March 3, 1873, were in conflict with the provisions of said act of April 28, 1904, and were therefore not adopted as a part of said latter act by force of section 4 thereof.

Fourteenth. The said Circuit Court erred in sustaining the said motion to quash the indictment and in rendering the said judgment upon the basis of and because of the erroneous statutory constructions indicated in the foregoing specifications of this assignment of errors.

Fifteenth. The said Circuit Court erred in its decision and ruling upon the objection interposed by the defendants to the introduction of any evidence, whereby said Circuit Court in substance held that the only issue that would be submitted to the jury was whether the defendants conspired to obtain the title to coal lands under the coal-land laws of the United States for the use and benefit of an alien corporation, said decision and ruling being based upon the several erroneous constructions of the statute mentioned in the preceding specifications of error.

79 Wherefore, the United States of America prays that the said judgment of the Circuit Court of the United States for the Western District of Washington be reversed, and that the said Circuit Court be directed to reinstate the said indictment and proceed with the trial of the cause.

Dated April 10, A. D. 1911.

B. D. TOWNSEND,  
*Special Assistant to the Attorney General.*

S. R. RUSH,  
*Special Assistant to the Attorney General.*

(Endorsed:) No. 1921. In the Circuit Court of the United States for the Western District of Washington. The United States of America v. Charles F. Munday et al. Assignment of errors. Filed, U. S. Circuit Court, Western District of Washington, Apr. 10, 1911, 4.19 p. m. Sam'l D. Bridges, clerk; W. D. Covington, deputy.

80 UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

United States of America, ss.

*The President of the United States to the honorable the judge of the Circuit Court of the United States for the Western District of Washington, greeting:*

Because in the decision, record, and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court



before you, between the United States of America, plaintiff, and Charles F. Munday, Archie W. Shiels, Earl E. Siegley, and Algernon H. Stracey, defendants, a manifest error has happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 10th day of April, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.]

SAM'L D. BRIDGES,  
*Clerk of the Circuit Court of the United States  
for the Western District of Washington.*

By W. D. COVINGTON, *Deputy.*

81 Allowed by

C. H. HANFORD,  
*Judge of the United States District Court  
for the Western District of Washington.*

*Return.*

THE UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said Circuit Court of the United States for the Western District of Washington, at Seattle, in said district, this 11th day of April, A. D. 1911.

[SEAL.]

SAM'L D. BRIDGES, *Clerk.*  
By W. D. COVINGTON, *Deputy.*

(Endorsed:) In the Supreme Court of the United States. The United States of America, plaintiff in error, v. Charles F. Munday et al., defendants in error. Writ of error. Filed, U. S. Circuit Court, Western District of Washington, Apr. 10, 1911, 4.23 p. m. Sam'l D. Bridges, clerk; W. D. Covington, deputy.



82 UNITED STATES OF AMERICA,  
Western District of Washington, ss:

United States of America, ss.

*To Charles F. Munday and Archie W. Shiels, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington; within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, sitting at Seattle, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Cornelius H. Hanford, judge of the District Court of the United States for the Western District of Washington, this 10th day of April, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.]

C. W. HANFORD,  
*Judge of the District Court of the United States  
for the Western District of Washington.*

Service of the foregoing citation is hereby acknowledged this 10th day of April, 1911.

E. C. HUGHES, WILMON TUCKER & WALTER S. FULTON,  
*Attorneys for Defendant Charles F. Munday.*

C. W. DORR and H. E. HADLEY,  
*Attorneys for Defendant Archie W. Shiels.*

83 (Endorsed:) In the Supreme Court of the United States.  
The United States of America, plaintiff in error v. Charles F. Munday et al, defendants in error. Citation in error. Filed, U. S. Circuit Court, Western District of Washington, April 10, 1911, 4.25 p. m. Sam'l D. Bridges, clerk; W. D. Covington, deputy.

84 UNITED STATES OF AMERICA,  
Western District of Washington, ss:

In the Circuit Court of the United States for the Western District of Washington.

THE UNITED STATES OF AMERICA, PLAINTIFF,  
v.

CHARLES F. MUNDAY, ARCHIE W. SHIELS, EARL E. Siegley, and Algernon H. Stracey, defendants. } No. 1921.

*Praecepte for transcript of record.*

*To the clerk of the Circuit Court of the United States for the Western District of Washington:*

In the above entitled cause you will please prepare transcript of the record, to be filed in the office of the clerk of the Supreme Court

of the United States, under the writ of error heretofore perfected to said court, and include in said transcript the following papers on file herein:

1. The indictment.
  2. The order removing said cause from the western division to the northern division of the Western District of Washington.
  3. Journal entries including judgment.
  4. Bill of exceptions.
  5. Order setting and certifying bill of exceptions.
  6. Petition for writ of error.
  7. Assignment of errors.
  8. Order allowing writ of error.
  9. Writ of error.
  10. Citation in error.
  11. Praecept for transcript.
  12. Opinion of the court.
  13. Certificate of clerk to transcript of record.
- Dated April 10, A. D. 1911.

B. D. TOWNSEND,  
*Special Assistant to the Attorney General.*

S. R. RUSH,  
*Special Assistant to the Attorney General.*

85 (Endorsed:) No. 1921. In the Circuit Court of the United States for the Western District of Washington. The United States of America v. Charles F. Munday et al. Praecept for transcript. Filed, U. S. Circuit Court, Western District of Washington, Apr. 10, 1911, 4.26 p. m. Sam'l D. Bridges, clerk; W. D. Covington, deputy.

86 UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

United States Circuit Court, Western District of Washington,  
Northern Division.

|  |   |                                  |
|--|---|----------------------------------|
| UNITED STATES OF AMERICA<br><i>vs.</i><br>CHARLES F. MUNDAY, ARCHIE W. SHIELS, AND<br>Earl E. Siegley. | } | No. 1921. Filed<br>Apr. 6, 1911. |
|--|---|----------------------------------|

Criminal prosecution by an indictment charging the defendants with the crime of conspiracy, by a scheme to fraudulently acquire coal lands in Alaska. Indictment quashed.

B. D. Townsend, S. R. Rush, special assistance to the Attorney General; Blaine, Tucker & Hyland, Walter S. Fulton, for Charles F. Munday; Kerr & McCord, for Earl E. Siegley; Dorr & Hadley, for Archie W. Shiels.

Mr. E. C. Hughes made an argument for defendants.

HANFORD, District Judge:

The Government prosecutes the defendants by an indictment founded upon section 5440 of the Revised Statutes of the United

States, charging them as criminal conspirators. A jury having been impaneled and sworn to try the case, counsel for the Government made an opening statement, giving an outline of the facts which the Government relies upon to sustain the charge. His statement, however, consisted of a mere reading of the indictment. After a witness had been called and sworn to testify, counsel for the defendants interposed an objection to the introduction of any evidence, on the ground, as they allege, that the indictment is insufficient to support a judgment adverse to their clients, and by arguments supporting their objection they have presented the concrete question whether the conspiracy charged is criminal or innocent.

In the consideration and decision of the question submitted it will be assumed that the indictment is a fair and complete statement of the Government's case; that is to say, it specifies the crime intended to be charged with definiteness and certainty, and contains a general outline of the chain of circumstances and the facts which the evidence to be offered will prove or tend to prove.

#### ELEMENTS OF CRIMINAL CONSPIRACY.

The only crimes punishable under Federal laws are those defined by the laws enacted by Congress therefore it must be kept in mind that the prosecution in this case is for an alleged statutory crime. The elements of the crime of conspiracy under the laws of the United States are:

1. An object to be accomplished, which must be—
  - (a) The commission of an offence against the United States;
  - (b) To defraud the United States.
2. A plan or scheme embodying means to accomplish the object.
3. An agreement or understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme or by any effectual means.
4. An overt act by one or more of the conspirators to effect the object of the conspiracy.

#### THE INDICTMENT ANALYZED.

The indictment names the three defendants on trial and one Algernon H. Stracey as the persons implicated in the conspiracy charged.

King Country, in the State of Washington, and the 1st day of May, 1905, are specified as the place and time of the formation of the alleged criminal combination.

The general charge of the indictment is that the four persons named, with divers other unknown persons, did unlawfully (omitting other adjectives) combine, confederate, and agree together to defraud the United States of America of the use and possession of and title to large tracts of valuable coal lands then and there part of the

public domain of the United States, situated within the Kayak recording district of Alaska; being contiguous tracts and parcels of coal lands collectively and commonly known as the "Stracey Group."

The indictment specifies that the lands referred to were subject to location and entry under the coal-land laws of the United States applicable to Alaska and subject to the several attempted locations and entries in a subsequent part of the indictment specified, except for the unlawful, fraudulent, false, feigned, and fictitious character of said attempted locations and entries; and that the value of said lands is ten million dollars.

The indictment contains other specifications of the nature of the intended fraud, some of which, however, are comprehended within the general charge of the purpose to defraud the United States by divesting the Government of its title to and proprietary rights in the coal lands designated, and therefore do not merit additional mention.

Other specifications of fraud are to the effect that the scheme included interference with the administration of the land business of the United States by deceiving the officers and agents of the Government in order to induce them to approve the several locations and entries and issue patents conveying the title to the coal lands designated.

The gravamen of the charge is an unlawful conspiracy to obtain coal land in Alaska for the Alaska Development Company, a corporation of the State of Washington, and the Pacific Coal & Oil Company, reputed to be a corporation organized and existing under the legal authority of some foreign government, to wit, the Dominion of Canada or one of its Provinces, the quantity of land so to be obtained for said corporations being in excess of the quantity which the law permits.

The several tracts of coal land to be acquired pursuant to the alleged conspiracy are forty in number, each being specifically described and identified as a coal claim bearing the name of the individual, locator, and claimant thereof, and by a serial number and by the area thereof expressed in acres and fractions of an acre, each claim being approximately  $\frac{1}{4}$  of a section.

The plan or scheme embodying the means whereby the object of the alleged conspiracy was to be accomplished are set forth with particularity in articulated paragraphs which I have epitomized as follows:

The objects and purposes of said unlawful conspiracy were to be furthered and effected by means of unlawful, fraudulent, false, feigned, and fictitious locations, notices of locations, preferential rights to purchase, applications to enter and purchase, and final entries and purchases under the coal-land laws of the United States; by cunning persuasion and promises of pecuniary reward and other corrupt means persons severally qualified by law (except as stated) should be procured and induced to make the fictitious locations and fraudulent entries of said tracts of coal lands

ostensibly for the exclusive use and benefit of themselves, respectively, but in truth and in fact for the use and benefit of the Alaska Development Company and the Pacific Coal & Oil Company; the possession of all of said coal lands was to be held and the use thereof enjoyed by persons ostensibly as the agent of and for the benefit of the individual claimants, respectively, but in truth and in fact as the agent of and for the use and benefit of said corporations; each claimant should be induced, persuaded, and procured to support his unlawful location and fraudulent entry by affidavits regular in form but containing false representations; that each of them, respectively, had opened and improved a coal mine and expended moneys in that behalf and staked out and located a coal claim including within its boundaries said coal mine, and had taken and held possession of said coal claims and intended to purchase from the United States under and pursuant to the coal-land law applicable to Alaska the tract of land so pretended to have been located. By said means the officers of the United States having charge of public-land matters should be deceived and induced to accept, file, and record notices of location and affidavits in the land office, and to segregate said coal lands from the public domain and withdraw the same from public entry under any of the public-land laws of the United States, and rights should thereby be acquired ostensibly for the benefit of the persons making such false affidavits, but in fact for the said corporations. Thereafter said coal-land claimants, respectively, should hold and exercise their

91 pretended and unlawful preferential rights to purchase said coal lands ostensibly for their own use and benefit, but in fact for the said two corporations. Thereafter said claimants should, in the form and manner provided by law, make applications to enter and purchase said coal lands ostensibly for their own use and benefit, but in fact for the said two corporations, and thereby the said corporations should receive and enjoy the benefits of a greater number of locations and entries of coal lands and for a greater quantity of coal lands than allowed by law. The respective shares and interests of said Alaska Development Company and of said Pacific Coal & Oil Company in the fruits and benefits of the unlawful conspiracy were to be adjusted so that said Alaska Development Company should receive and enjoy the title, use, and value of all of said coal lands subject to a contract entered into between said two corporations prior to the transactions and which was in full force and effect at and during all of the times mentioned, by which it was provided that as between said corporations the Pacific Coal & Oil Company should be entitled to take and hold possession of said coal lands, operate the mines thereon, and extract the coal therefrom, paying a royalty therefor to said Alaska Development Company, and have an option to purchase all of said coal lands within certain stated times and for certain stated prices.

Overt acts are charged, substantially, as follows:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect its object, Archie W. Shiels, one of the



defendants, did unlawfully, on specified dates, cause each of the said coal claims to be surveyed by a mineral surveyor of the United States. Said survey being intended for use in applications to enter and purchase the said coal claims by the respective claimants

92 thereof, and thereafter in further pursuance of and to effect the object of said unlawful conspiracy, the said Shields did knowingly, on specified dates, file and cause to be filed in the office of the surveyor general of the United States for Alaska, each and all of the said official surveys and the field notes thereof. The indictment then sets forth in tabulated form a list of the claims surveyed, with the dates on which the surveys were made and the filing dates, said claims being forty in number and identified by the names of the claimants as the same claims previously mentioned. The indictment then alleges a number of other overt acts in furtherance of and to consummate the conspiracy, indicating that the scheme was carried out to the extent of filing applications to purchase said claims by each of the locators and payment of the Government's price to the officers of the local land office for the district of Alaska in which the lands are situated, and that in the transaction of said business the defendants, or one of them, acted as attorney or agent of all of the locators. The indictment alleges other transactions subsequent to the first day of January, 1910, including written communications referring to money advanced by the Pacific Coal and Oil Company, for which security was to be taken in the form of mortgages to be executed by the several entrymen and payments of money to the receiver of the land office at Juneau, in payment of the Government price for a number of said coal claims. Finally the indictment charges that on a specified date subsequent to January 1, 1910, one of the defendants paid to the receiver of the land office at Juneau the Government price for thirty-eight of said coal claims.

It is to be specially noted that the indictment does not charge that the several locators were dummies; on the contrary it is

93 expressly averred that they were each of them competent to make entries of coal lands in Alaska, and not disqualified except for particular reasons in the indictment specified, and it is not charged as one of those particular reasons that their locations were illegal because of any failure to do the things which the law makes essential to the acquisition of rights as locators of coal land, nor that more than one coal right was to be or had been exercised by any one locator.

To avoid possible complications from the enactment of the criminal code which went into effect on the 1st day of January, 1910, counsel for the Government voluntarily announced an abandonment by the Government of the charges contained in the indictment of overt acts subsequent to that date as elements of the crime with which the defendants are charged.

#### PROVISIONS OF THE STATUTE AFFECTING COAL CLAIMS IN ALASKA.

For convenience of reference, I will use Pierce's Federal Code, being a compilation of all the statutes of the United States of a



general and permanent nature in force March 4, 1907, with a supplement continuing the compilation to January 1, 1910. In this volume the coal-land laws of the United States necessary to be considered in the determination of the question—whether the defendants intended or attempted to perpetrate a fraud—are set forth in a group in sections numbered consecutively from 10044 to 10054, inclusive, the same being an accurate reprint of the laws comprised in sections 2347 to 2352 of the Revised Statutes of the United States, and in 31 U. S. Stat. at L., p. 658, and in 33 U. S. Stat. at L., p. 525. Sections 10044 to 10049, inclusive, being identical with sections 94 2347 to 2352, inclusive, of the Revised Statutes, comprise the general coal-land law of the United States enacted by Congress in the year 1873. Referring to the sections by the code numbers, the statutes contain the following provisions:

Section 10044 prescribes a rule for the acquisition from the Government of coal lands being part of the public domain of the United States by cash entry. By said rule the right to make entries is limited to persons and associations whose qualifications are defined in the following words: "Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, and the maximum quantity of coal lands which may be entered by a single individual or an association, is fixed and the minimum price to be paid therefor is also fixed."

Section 10045 provides for a preference right of entry in favor of any person or association of persons severally qualified as provided in the preceding section, who have opened and improved or shall open and improve any coal mine or mines on the public lands and shall be in actual possession of the same; and further provides that when any association not less than four persons, severally qualified as above, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Section 10046 relates to the presentation of claims for preferential rights and details of procedure to secure the same.

Section 10047 reads as follows:

95 "The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections, shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon

failure to file the proper notice, or to pay for the land within the required period; the same shall be subject to entry by any other qualified applicant."

Section 10048 relates to conflicting claims upon coal lands on which improvements shall have been commenced.

Section 10049 is a saving clause of rights which may have attached prior to the enactment of the law.

Section 10050 is the act of Congress approved June 6, 1900, extending to the District of Alaska so much of the public-land laws of the United States as relates to coal lands, namely, sections 2347 to 2352, inclusive, of the Revised Statutes.

Section 10051-10054, inclusive, comprise the act of Congress approved April 28, 1904, entitled: "An act to amend an act entitled 'An act to extend the coal-land laws to the District of Alaska,' approved June sixth, nineteen hundred," which reads as follows:

"10051. That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in the recording district and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of location, the description of the lands located, and a reference  
96 to such natural objects or permanent monuments as will readily identify the same.

"10052. SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated, an applicant therefore, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor general for the District of Alaska; and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the District of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located

for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: Provided, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

"10053. SEC. 3. That during such period of posting and publication, or within six months thereafter, any person, or association of persons, having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased, shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

"10054. SEC. 4. That all the provisions of the coal-land laws of the United State not in conflict with the provisions of this act shall continue and be in full force in the District of Alaska."

The statute comprised in these four quoted sections is specially applicable to Alaska and was enacted by Congress to meet an urgent demand, amounting to necessity, and because the previous statute of June 6, 1900, extending the general coal-land law of the United States to Alaska, was impracticable because conditions made it impossible to acquire any rights under it by compliance with its requirements.

In a letter addressed to the registers and receivers in the District of Alaska, dated June 27, 1900, the Commissioner of the General Land Office announced the enactment of this law, and explained that under sections 2347 to 2352, inclusive, of the Revised Statutes, which the act purported to extend to Alaska, coal-land filings and entries must be by legal subdivisions as made by the regular United States survey, and that under section 2401 of the Revised Statutes as amended by the act of August 20, 1894, no application for a special survey shall be granted unless the township proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys, and that as no township or subdivisional surveys have been made nor any standard lines or bases for township and subdivisional surveys established within Alaska, therefore until the filing in the local land office of the official plat of survey of a township, no coal filing nor entry can be made. This was in fact an official declaration of the attempt and failure of Congress to make provision, by a practicable law, for the acquisition by individuals and associations of rights in and to coal lands in Alaska.

Instead of attempting to state the provisions of the law of 1904 in different phrasology, I have quoted it because it is the opinion of the court that it is not in any particular ambiguous. It means

what the words selected by Congress express according to the common and general understanding of people accustomed to use the English language. It needs not to be construed and there is no authority to interpolate into its provisions restrictions and limitations of rights which it grants, by judicial interpretation or construction. In the case of *Newhall v. Sanger* (92 U. S., 765), Mr. Justice Davis said, "There is no authority to import a word into a statute in order to change its meaning."

By the arguments made it appears that this prosecution is founded, in part at least, upon a theory that the restrictions of section 10047 above quoted are to be deemed as being imported into the law of 1904. That contention is untenable for the reason that by the express words of that section which I have quoted those restrictions apply only to persons and associations claiming or exercising rights under the three preceding sections, which were and are inapplicable to conditions in Alaska, and never did have potential force there. The statute of 1904, applicable only to Alaska, is a declaration of the will of Congress subsequent to the act of June 6, 1900, extending the law of 1873 to Alaska, and therefore is the paramount law. The later law does not in words, nor by reference to and adoption of the provisions of the older law, restrict persons or associations to a single exercise of the right granted to locate coal claims and secure patents therefor. The argument that section 10047 must be read into the Alaska statute is that the right to locate is given only to persons and associations qualified to make entry under the coal-land laws of the United States, and that these words exclude persons and associations having the qualifications prescribed, but disqualified by reason of having once exercised the right. By this argument there is interpolated into the statute words additional to and expressing a meaning different from the plain declaration of the law itself. The prescribed qualifications are age and citizenship. By the law of 1873 a person 99 twenty-one years of age and a citizen of the United States is qualified to make an entry of coal land, and having the same qualifications and having, also, opened or improved a coal mine or unsurveyed public land in Alaska, he is entitled to become a locator of a coal claim, including the mine which he has opened or improved. This is so according to the letter of the law. And having located a coal claim, he may sell it and his vendee, if a citizen of the United States or an association composed of citizens, are entitled to receive a patent conveying the complete title from the Government by compliance with the requirements of section 10052. To say that a vendee of a qualified locator to be entitled to receive a patent must be a citizen or association of citizens qualified as prescribed to make an entry of coal land, and not disqualified by having exercised a right to acquire coal land from the Government, infringes legislative power, for in the guise of construction a radical change in the law would be effected by the addition of requirements and restrictions which the law-making power did not put there. The words of the law are:

"That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting \* \* \*." By having made citizenship a requisite condition of the right to receive a patent, the law makes citizenship the only requisite condition to the right. This is so by the rule declared by the Supreme Court in the words of Mr. Justice Davis, above quoted, which is a fundamental rule for the construction and interpretation of statutes. *Expressum facit cessare tacitum.*

100 Congress intended to enact a practicable, workable law, and if its second attempt to do so be not made futile by misconstruction, we have such a law. It is not a law made to serve the purpose of monopolists who would keep the coal of Alaska locked up within her mountain walls, nor is it based upon any fantastic notion that trusts can be annihilated by giving coal rights to no one except the man who by personal toil may dig the coal and carry it to market upon his back or upon his head. It is the duty of the court to not misconstrue the law nor stigmatize the Congress which enacted it and the President who approved and signed it by imputing to them a lack of either sense or honesty. This law by its words and intent limits the rights of a qualified locator who has opened or improved a coal mine in Alaska by prescribing the maximum area and the form of the tract which he may secure by doing the things which the law exacts, and by making the opening or improving of a coal mine the initiatory step, and the marking of boundaries and corners, and the posting and recording of notices essential to a valid location. These requirements necessitate expense and trouble, and it is not for the court to say that as restrictions and limitations they are not sufficient. The responsibility of determining all such questions belongs to the legislative branch of the Government. To become entitled to a patent the locator or his assigns must publish and keep posted the notice prescribed by the second section of the act and furnish proof of such publication and posting "and such other proof as is required by the coal-land laws." We now look to the coal-land laws to find what other proof must be furnished. We

101 search the law to find what other proofs are required rather than regulations promulgated by departmental officers, because the words of the act refer to the law, and do not leave the locator who has opened and improved a coal mine under the necessity of complying with the personal will of bureau officers authorized to change the regulations as often as they may think that they discover reasons for more exacting condition. Section 10047 of the code contains this clause: "All persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon \* \* \*." This is undoubtedly the other proof referred to, and by the selection and adoption of that particular clause there is plainly manifested a definite purpose to not graft the other provisions of the same section upon the Alaska coal-land laws. Locators of coal claims in Alaska under this law have the right to use business sense, to look ahead



and make arrangements for working capital, and to contract in advance for transportation facilities, and to sell or mortgage their claims. By mandatory words the law prescribes that the locator who meets the requirements prescribed shall receive a patent. He may sell his claim before obtaining the patent, and if he does so, his vendee, if a citizen of the United States or an association of citizens, shall receive the patent. It is not to be inferred that the law will permit the acquisition of coal lands in Alaska through the medium of dummy entrymen. In land-office practice dummies are either fictitious persons or those who, having no interest in the transaction, permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfunctorily. A man who opens or improves a coal mine in Alaska and locates a claim in the form prescribed by the statute, including his improvements, and marks

102 its lines and corners so that its boundaries can be readily traced on the ground, and posts and records a notice in conformity to the requirements of the statute, and is then competent and entitled to deal with the claim as his own property, to sell it, lease it, mortgage it, or keep it and derive for himself all the profits and benefits to be derived from the most advantageous use or disposition of such property, is not a dummy entryman.

This understanding of the law does not make it inconsistent with its title. It is an amendatory statute. It amends not by changing any provision of previously enacted laws, but by making additions thereto especially applicable to local conditions in Alaska. This appears the more obvious when all of the laws affecting the acquisition of rights to coal lands are grouped in chronological order as they appear in Pierce's Federal Code.

Nothing is to be implied from the peculiar phraseology of the 4th and last section. By its words all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the District of Alaska. This continues the existing status as to all the provisions of the coal-land laws of the United States not in conflict with the new enactment. If there be conflicting provisions the older enactments yield to the new. Provisions which do not conflict continue in force, and when conditions shall be changed so that their requirements may be complied with, it will be legal and practicable to make cash entries and acquire preferential rights.

A foreign corporation can not lawfully acquire or hold a coal claim in Alaska either in its corporate name nor in the name of  
103 any agent or trustee. Therefore, for the reason that the indictment charges a conspiracy to acquire coal claims or proprietary rights to coal claims in Alaska for a foreign corporation, it must be sustained as a valid indictment, and the objection to the introduction of evidence must be overruled. The court will, however, instruct the jury that to justify a conviction of the defendants under it the evidence must prove that the object of the conspiracy, if any, must have been to perpetrate a fraud by securing coal claims



or proprietary rights in coal claims in Alaska for the Pacific Coal & Oil Company.

#### ADDENDA.

After the announcement by the court of its decision and ruling on the objection to the introduction of evidence, as indicated in the foregoing opinion, in order to facilitate a review of the decision by the Supreme Court, the trial was terminated, pursuant to a stipulation, by and between counsel for the Government and counsel for the several defendants, by the following proceedings:

#### I.

The Government does now and here abandon for all time the charge in the indictment of the foreign or alien character of the Pacific Coal and Oil Company as an element of the crime sought to be charged by the indictment.

#### II.

Defendants now move the court that the indictment be quashed and that the defendants be discharged upon the following grounds:

1. That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the  
104 United States, nor with the violation of any law of the United States.

2. That the said indictment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States.

3. That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States.

This motion is based upon the general grounds that the laws of the United States regulating the disposition of coal lands in the District of Alaska, during the times set forth in the indictment, did not prohibit the transactions, or any of them, charged in the indictment, as contemplated by and a part of the alleged conspiracy therein set forth.

In order to obviate any question of double jeopardy, and for the purpose of making the record in such form that a writ of error will lie to the Supreme Court in favor of the Government, under the act of March 2, 1907, the Government now moves that the court withdraw one of the jurors before ruling upon the motion just interposed on behalf of the defendants.

The defendants, and each of them, being personally present, consent to the withdrawal of the juror by the court, as requested by counsel for the Government, and Mr. Funk, one of the jurors, is thereupon excused and withdrawn from the jury by the court.

The COURT. The motion made on behalf of the defendants is granted by the court, the indictment is quashed, and the defendants are discharged. This ruling is based upon a construction of the coal-land laws of the United States applicable to the District of Alaska, and the grounds of the court's ruling are as set forth in the written opinion or opinions filed or to be filed herein.

Counsel for the Government asks that an exception be noted to the ruling of the court, and the exception is allowed by the court.

C. H. HANFORD, *Judge*.

(Endorsed:) No. 1921. In the Circuit Court of the United States for the Western District of Washington, Northern Division. United States of America vs. Charles F. Munday, Archie W. Shiels, and Earl E. Siegley. Opinion. Filed, U. S. Circuit Court, Western District of Washington, Apr. 6, 1911. Sam'l D. Bridges, Clerk; W. D. Covington, deputy.

106 UNITED STATES OF AMERICA,  
*Western District of Washington, ss:*

I, Sam'l D. Bridges, clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing 105 printed pages, numbered from 1 to 105, inclusive, to be a full, true, and correct copy of the records and proceedings in a certain cause lately in said court pending, wherein the United States of America was plaintiff and Charles F. Munday, Archie W. Shiels, Earl E. Siegley, and Algernon H. Stracey were defendants, including all records, proceedings, and documents called for by the praecipe filed herein, together with a true copy of such praecipe, and all other matters (exclusive of bench warrants, recognizances, praecipes for subpœna, and subpœnaes with the returns thereon) heretofore filed or entered of record in said court, as fully and completely as the same still remain of record and on file in the office of the clerk of said court, and that the same constitutes the return to the writ of error received and filed in the office of the clerk of said court on April 10, A. D. 1911.

I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in the above entitled cause, to-wit, the opinion handed down in said cause on April 3, A. D. 1911, and the additional explanatory note to said decision handed down on April 4, A. D. 1911, said original opinion and additional explanatory note having by the court been combined in  
107 one opinion and handed down and filed on April 6, A. D. 1911.

I further certify that I annex hereto and herewith transmit the original writ of error and citation in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said district, this 11th day of April, A. D. 1911.

[SEAL.]

SAM'L D. BRIDGES, *Clerk*,  
By W. D. COVINGTON, *Deputy*.

108 UNITED STATES OF AMERICA, ss:

*The President of the United States to the honorable the judge of the Circuit Court of the United States for the Western District of Washington, greeting:*

Because in the decision, record, and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between the United States of America, plaintiff, and Charles F. Munday, Archie W. Shiels, Earl E. Siegley, and Algernon H. Stracey, defendants, a manifest error has happened, to the great damage of the said United States of America, as by its complaint appears. We, being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward Douglass White, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.]

SAM'L D. BRIDGES,

*Clerk of the Circuit Court of the United States  
for the Western District of Washington.*

By W. D. COVINGTON, Deputy.

Allowed by

C. H. HANFORD,

*Judge of the United States District Court  
for the Western District of Washington.*

109

*Return.*

THE UNITED STATES OF AMERICA,

*Western District of Washington, ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said Circuit Court of the United States for the Western District of Washington, at Seattle, in said district, this 11th day of April, A. D. 1911.

[SEAL.]

SAM'L D. BRIDGES, Clerk.

By W. D. COVINGTON, Deputy.

(Indorsed:) In the Supreme Court of the United States. The United States of America, plaintiff in error, v. Charles F. Munday et al., defendants in error. Writ of error. Field, U. S. Circuit Court, Western District of Washington, Apr. 10, 1911, 4.23 p. m. Sam'l D. Bridges, clerk; W. D. Covington, deputy.

111 UNITED STATES OF AMERICA, ss:

*To Charles F. Munday and Archie W. Shiels, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, sitting at Seattle, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Cornelius H. Hanford, Judge of the District Court of the United States for the Western District of Washington, this 10th day of April, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.]

C. H. HANFORD,

*Judge of the District Court of the United States  
for the Western District of Washington.*

Service of the foregoing citation is hereby acknowledged this 10th day of April, 1911.

E. C. HUGHES, WILMON TUCKER, and WALTER S. FULTON,  
*Attorneys for defendant, Charles F. Munday.*

C. W. DORR and H. E. HADLEY,  
*Attorney for defendant, Archie W. Shiels.*

(Indorsed:) In the Supreme Court of the United States. The United States of America, plaintiff in error, v. Charles F. Munday et al., defendants in error. Citation in error. Filed, U. S. Circuit Court, Western District of Washington, Apr. 10, 1911, 4.25 p. m. Sam'l D. Bridges, clerk; W. D. Covington, deputy.

(Indorsed on cover:) File No., 22664. W. Washington, C. C. U. S. Term No. 1043. The United States, plaintiff in error, vs. Charles F. Munday and Archie W. Shiels. Filed May 11th, 1911. File No. 22664.

# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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THE UNITED STATES OF AMERICA,  
    plaintiff in error,

v.

CHARLES F. MUNDAY AND ARCHIE W.  
    Shiels.

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No. 1043.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF WASHINGTON.*

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## MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this case and assign it for hearing during the October term, 1911.

This writ of error was sued out under the Criminal Appeals act of March 2, 1907 (34 Stat., 1246), from a judgment of the Circuit Court quashing an indictment against the defendants, such decision being based upon a "construction of the statute upon which the indictment is founded."

The indictment charged a conspiracy (sec. 5440, R. S.) to defraud the United States of approximately 5,000 acres of coal lands in the District of Alaska by means of false, fraudulent, and fictitious

locations and entries, ostensibly for the use and benefit of the persons, respectively, in whose names such entries were to be made, but in truth and in fact for the use and benefit of two certain corporations, such locations and entries being in violation of the restrictions and prohibitions contained in the coal-land laws of the United States applicable to the District of Alaska, consisting of sections 2347 to 2352, inclusive, of the Revised Statutes, the act of June 6, 1900 (31 Stat., 658), and the act of April 28, 1904 (33 Stat., 525).

The case came on for trial, a jury was impaneled, opening statement was made, and the first witness was called on behalf of the Government. Thereupon defendants moved that the indictment be quashed upon the ground that the coal-land laws of the United States applicable to the District of Alaska did not prohibit the acquisition of coal lands by the means charged in the indictment. The motion depended upon a construction of the statutes upon which the indictment was founded. The court sustained the motion and quashed the indictment upon the aforesaid ground, the court stating that the decision and judgment were based "upon a construction of the coal-land laws of the United States applicable to the District of Alaska." (R., 70.)

To obviate any question of double jeopardy, and for the purpose of permitting a review of the decision by writ of error under the act of March 2, 1907, before the court made its ruling and decision upon the motion to quash the indictment, one of



the jurors was withdrawn and excused by the court, with the consent of the defendants. The procedure was identical with that in *United States v. Press Publishing Company* (219 U. S., 1).

As this is a criminal case, and as the criminal appeals act requires that writs of error thereunder "shall be diligently prosecuted and shall have precedence over all other cases," this motion to advance is respectfully submitted.

This motion is made with the concurrence of counsel for defendants in error.

FREDERICK W. LEHMANN,  
*Solicitor General.*

MAY, 1911.

# **In the Supreme Court of the United States.**

OCTOBER TERM, 1911.

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|---|------------|
| THE UNITED STATES, PLAINTIFF IN ERROR,  | } No. 593. |
| <i>v.</i>                               |            |
| CHARLES F. MUNDAY AND ARCHIE W. Shiels. |            |

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*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF WASHINGTON.*

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## **BRIEF FOR THE UNITED STATES.**

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### **STATEMENT OF CASE.**

This is an indictment under section 5440, R. S., for a conspiracy to defraud the United States.

The charge is that the defendants named conspired with each other and with persons unknown to secure for the Alaska Development Company, a corporation of the State of Washington, and the Pacific Coal and Oil Company, a corporation of the Dominion of Canada, coal lands of the United States, approximately 6,087 acres, and more than \$10,000,000 in value. These lands were situated in the Kayak recording district of Alaska.

Various persons, forty in number, each being qualified to make an entry of coal land, if he was making it for himself, were induced to make entries, ostensibly for themselves, but in fact as the agents of and for the use and benefit of the two corporations named, with the result of securing to the corporations much more coal land than any two persons or associations of persons were entitled to get by entry under the coal-land laws.

The indictment is voluminous, extending from page 2 to page 24 of the printed record, and sets out many overt acts, but these are all part and parcel of the plan to get this large tract of coal land from the Government for these two corporations, and to do this through locations made by persons who while pretending to act for themselves were really acting for the corporations. This involved a variety of false statements, representations, and affidavits.

There was filed a plea of not guilty. A jury was impanelled, the opening statement made on behalf of the Government, and a witness sworn. The defendants then objected to the introduction of any evidence in the case and moved the court to direct a verdict in their favor. (R., 31, 32.)

The court overruled this motion, but upon the sole ground that the Pacific Coal and Oil Company, being a foreign corporation, was not entitled to any coal lands under the coal-land laws of the United States, and so the charge in the indictment of a purpose by the defendants to secure lands for this company was a valid charge of an intent to defraud the United

States. (R., 42, 43.) Thereupon the Government through its counsel announced that it "does now and here abandon for all time the charge in the indictment of the foreign or alien character of the Pacific Coal and Oil Company as an element of the crime sought to be charged by the indictment." (R., 43.)

The defendants then moved to quash the indictment "upon the general grounds that the laws of the United States regulating the disposition of coal lands in the District of Alaska, during the times set forth in the indictment, did not prohibit the transactions, or any of them, charged in the indictment, as contemplated by and a part of the alleged conspiracy therein set forth." (R., 43.)

By consent of parties, "to obviate any question of double jeopardy, and for the purpose of making the record in such form that a writ of error will lie to the Supreme Court in favor of the Government," a juror was withdrawn. (R., 44.)

The juror having been withdrawn, the motion to quash the indictment was sustained. (R., 44.)

The Government brings the case here by writ of error and by appropriate assignments of error (R., 46 to 49), brings under review the decision of the Circuit Court, which was that section 2350, R. S., was not a part of the coal-land laws of Alaska, and consequently persons or associations operating in Alaska were not restricted "to a single exercise of the right granted to locate coal claims and secure patents therefor."

# PROPOSITION AND AUTHORITIES.

Section 2350, R. S., is, by the express terms of sections 1 and 4 of the act of April 28, 1904, continued in force in the District of Alaska, and this prohibits more than one entry of coal land by or for the same person or association of persons.

*United States v. Doughten* (186 F. R., 226);

*Wisconsin Central R. R. Co. v. United States* (164 U. S., 190);

*Morton v. Nebraska* (21 Wall., 660);

*United States v. Trinidad Coal Co.* (137 U. S., 160);

*United States v. Keitel* (211 U. S., 370);

*United States v. Scofield et al.*, General Land Office, June 21, 1911.

## ARGUMENT.

The ruling of the Circuit Court is of the utmost practical importance. If it is sound, entries of coal lands in Alaska may be made by the same person or association of persons, without limit as to number or even as to the time within which different entries may be made, and one person or association of persons may locate at one and the same time upon all the coal lands of the district.

The general provisions respecting the entry of coal lands are to be found in the following sections of the Revised Statutes of 1873:

SEC. 2347. *Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to*

*enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.*

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

SEC. 2349. All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on



file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

SEC. 2350. *The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.*

SEC. 2351. In case of conflicting claims upon coal-lands where the improvements shall be

commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

SEC. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

We have italicized the portions of the statutes particularly to be considered.

It is to be observed that under the foregoing provisions there could be no entry of *unsurveyed* lands, because the entry must be "by legal subdivisions."

To meet this situation section 2401, R. S., relating to surveys, was amended August 20, 1894 (28 Stat., 423), to read as follows:

When the settlers in any township not mineral or reserved by the Government, *or persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof, or*

*when the owners or grantees of public lands of the United States, under any law thereof, desire a survey made of the same under the authority of the surveyor-general and shall file an application therefor in writing, and shall deposit in a proper United States depository to the credit of the United States a sum sufficient to pay for such survey, together with all expenditures incident thereto, without cost or claim for indemnity on the United States, it shall be lawful for the surveyor-general, under such instructions as may be given him by the Commissioner of the General Land Office, and in accordance with law, to survey such township or such public lands owned by said grantees of the Government, and make return therefor to the general and proper local land office: Provided, That no application shall be granted unless the township so proposed to be surveyed is within the range of regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys.*

The amendment made is shown by italics.

June 6, 1900, was passed "An act to extend the coal land laws to the district of Alaska." (31 Stat., 658.) This provides:

That so much of the public land laws of the United States are hereby extended to the district of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes.

This act did not at the time operate to open the coal lands of Alaska for entry because there had been no survey in Alaska, and so there were no legal subdivisions of the land. And there could be no survey under section 2401, R. S., quoted *supra*, because, while the system of public-land surveys was extended to Alaska by an act of March 3, 1899, no township or subdivisional surveys had been made, and no standard lines or bases for such surveys had been established. So the registers and receivers of Alaska were each and all instructed by circular letter from the Department of the Interior on June 27, 1900, that "until the filing in your office of the official plat of survey of the township no coal filing nor entry can be made."

April 28, 1904, was passed "An act to amend an act entitled 'An act to extend the coal-land laws to the district of Alaska'" (33 Stat., 525). This provides:

*That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and*

easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

SEC. 2. That such locator or locators, their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and

in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

SEC. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

SEC. 4. *That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.*

What was intended by this act of 1904? In the case at bar the court held that it removed the restrictions imposed by section 2350, R. S., upon the number



of entries which might be made of coal lands in the unsurveyed regions of Alaska by persons or associations qualified as provided in section 2347, R. S., *United States v. Munday* (186 F. R., 375), while the Circuit Court for the Eastern District of Washington in another case held that all those restrictions were by the very terms of the act of 1904 continued in full force throughout the District of Alaska. (*United States v. Doughten*, 186 F. R., 226.)

It would seem that in a case of such direct conflict of judicial opinion there must be grave doubt as to the right solution of the question involved, but after the most diligent study of the law and the history of its enactment we are not so impressed.

Authorities declaring the general principles of statutory construction, and particularly of the construction of statutes making grants of public rights or property, might be cited in great abundance, but it would serve no good purpose. Such statutes, we know, are to be strictly construed against the grantee. (*Wisconsin Central Railroad Co. v. The United States*, 164 U. S., 190.) And so, too, a manifest policy of the Government with regard to some distinctive public property, which has been long established and steadfastly pursued, will not be deemed to have been abandoned "unless the law on the subject admits of no other construction." (*Morton v. Nebraska*, 21 Wall., 660.)

In this case we need not wander far afield, and throughout this discussion we shall hold to the

coal-land laws, and to legislative, departmental, and judicial action concerning them.

The original coal-land laws, sections 2347 to 2352, R. S., have more than once been under consideration by this court.

In *United States v. Trinidad Coal Company* (137 U. S., 160) certain officers, stockholders, and employees of a corporation formed a scheme in pursuance of which they made entries of coal lands in their individual names, but really for the benefit of the corporation. When patents were issued for the land it was at once conveyed to the company, which had paid all the expenses incurred. The suit was to set aside the patents as procured by fraud. It was contended that, as the individuals had a right to enter this land for themselves, and had a right to sell it after they had acquired title to it, there was no fraud upon the United States in making the entry in the first instance for the benefit of the corporation. This court said (pp. 166, 167):

\* \* \* This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute.

In *United States v. Keitel* (211 U. S., 370) the indictment, as here, was under section 5440 for a conspiracy to defraud the United States. The scheme, as here, was to have individuals make entry of coal lands, apparently for themselves, really for a corporation. It was contended, and ruled by the lower court, that the transactions charged were not prohibited by the coal-land laws and did not constitute a fraud upon the Government. Although the question was foreclosed by the case of the Trinidad Coal Company this court considered it anew, and in an elaborate opinion declared the same construction of the law, and so sustained the indictment as making a valid charge of crime.

There can, in view of these cases, be no question as to the meaning of sections 2347 to 2352 of the Revised Statutes. They restrict persons and associations to a single exercise of the right granted by them. And so every entry, whether by an individual or association, must be as it appears to be, by the person making it, for himself, or by the association for itself, and free from any arrangement or agreement to sell or convey it to another.

It is said, however, by the Circuit Court in this case that section 2350 is not a part of the coal-land laws of Alaska, and was not intended by Congress to be part of them.

We have seen that, notwithstanding the act of 1900, there could be no purchase of coal lands in Alaska, because they were not within the region of public

survey. This was the situation with which Congress had to deal in 1904.

Bills exactly the same were introduced in the House and Senate, being House bill 8869 and Senate bill 2814.

The bills provided for the entry and purchase of unsurveyed coal lands in Alaska.

As to persons entitled to make entries, the provision was, in section 1, "that any person, or association of persons, qualified to make entry under the coal-land laws of the United States, who shall," etc. The remainder of section 1 and sections 2 and 3 dealt with matters of procedure.

Section 4, however, provided:

That upon filing of the declaratory statement and application to enter lands, together with the plat and field notes of the same, under the provisions of this Act, the register and receiver of the land office shall issue to claimant a certificate setting forth facts of said entry, and of the right of claimant to purchase the same; and thereafter the claimant will be entitled to sell and transfer his right to purchase said land, and the purchaser be entitled to make due proof and payment therefor under the provisions of this Act in the same manner as the original claimant; and *nothing in this Act shall prevent a bona fide purchaser for value from making proof and payment for more than one claim so purchased, provided the original claimant was qualified under the law to enter and purchase coal lands.*

Section 5 fixed the price to be paid and section 6 authorized necessary rules and regulations to be made by the Secretary of the Interior.

The bills contained no provision continuing in force in Alaska the general coal-land laws, nothing whatever resembling section 4 of the bill as enacted.

The House committee recommended striking out all after the enacting clause and substituting a short measure of two sections, which, however, did not become law.

We set out in an appendix the report of the committee in full and ask the court to note that in the report recommending the bill there was nothing said as to enlarging the extent of entry or purchase that might be made under the bill, and that there was no provision for such enlargement in the bill itself. Neither was there an express continuation of the provisions of the general coal-land laws.

The report and the bill recommended provided only "for the special survey and entry of unsurveyed coal land in Alaska."

We turn now to the Senate, and its action is important, as the Senate bill, after radical amendment, became the law.

The Senate Committee on Public Lands referred the bill containing the various provisions set out or summarized above to the Department of the Interior for recommendations.

The Commissioner of the General Land Office and the Secretary of the Interior drafted a substitute which made an entirely different measure, and rec-

ommended it for enactment, and as this measure, with slight changes not relevant here, became the law, their recommendation is helpful to an understanding of the law.

Their measure extends the right of entry to unsurveyed lands in Alaska by "any person or associations of persons qualified to make entry under the coal-land laws of the United States," and prescribes a procedure therefor, differing from the existing procedure chiefly in the greater length of time allowed for the different steps to be taken, and this because of the peculiar local conditions, as distance from land offices and difficulties of travel. And these procedural changes are the only changes made. There is no enlargement in any manner of the extent of the entry or purchase which may be made.

On the contrary, they call especial attention to section 4 of the original bill, which enlarges the right of purchase of coal claims after certificate of location has issued, and they condemn it, saying:

The fourth section of the bill allows but one filing to the individual, but permits the assignee of a declarant to purchase as many claims as he desires. In my opinion the enactment of this section would be in the interest of the speculator and capitalist and permit of the acquisition of valuable coal lands in vast tracts, *thus creating monopolies which the existing coal-land laws were intended to prevent.*



And, finally, they submit, and it here appears for the first time, the following as section 4 of the new law:

SEC. 4. That all of the provisions of the coal-land laws of the United States, not in conflict with the provisions of this act, shall continue and be in full force in the district of Alaska, *and no coal shall be mined for sale outside of said district until a patent shall have issued for the land from which it is mined.*

The law as thus drafted by the Department of the Interior was approved by the Senate committee, saving the provision in section 4, as to mining coal for sale outside of Alaska, which the committee rejected.

The department bill as thus amended in the committee and with the further change, from "thirty days" to "six months" in the third section of the bill, was passed by the Senate and House and approved by the President. The full report of these matters may be found in the appendix.

From this it is obvious that the department, Congress, and the President, intended no change whatever in the coal-land laws as applied to Alaska, save and except to extend them as they existed to the unsurveyed regions of the district, and to adapt mere matters of procedure in making locations and perfecting entries to the peculiar local conditions of Alaska. Because of distances and difficulties of travel and communication there was an allowance of more time, *but not an allowance of more land or more entries.*

The department certainly thought its purpose had been accomplished, and its action under the law of 1904 was determined accordingly.

The regulations promulgated July 18, 1904, provided:

Persons or associations of persons locating coal lands in the district of Alaska under the provisions of the act are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States. And the requirements in this particular are to be found in the coal-land circular approved July 31, 1882 (1 L. D. 687), paragraphs 30 and 31, amended (32 L. D. 382).

In the regulations promulgated April 12, 1907, it is provided:

That persons or associations of persons locating or entering coal lands in the District of Alaska under the provisions of the act of April 28, 1904 (33 Stats., 525), amendatory of the act of June 6, 1900 (31 Stats., 658), are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States, and are subject to the same limitations.

And section 5 of said regulations provided:

But one entry of coal lands by any person or association of persons is allowed by the law. No person who and no association any member of which either as an individual or as a member of an association shall have had the benefits of the law may enter or hold any other

coal lands thereunder. The right so to enter or hold is exhausted whether an entry embraces in any instance the maximum area allowed by the law or less.

And in harmony with these regulations is the decision of the Land Commissioner, approved by the Secretary of the Interior, in the recent case of *United States v. Scofield et al.*, which, so far as it deals with the construction of the act of 1904, is also set out in the appendix.

It may be properly and pertinently observed at this point that the action of individuals, even of the parties concerned in this case, who sought to avail themselves of the benefit of the law, was in all its forms and outward manifestations in accordance with the views of the department.

Congress, too, by its subsequent action showed that it did not believe it had by the act of 1904 enlarged the extent of entry and purchase of coal lands, for by an act of May 28, 1908 (35 Stat., 424), provision was made that persons who have in good faith in their own interest made locations of coal lands in Alaska prior to November 12, 1906, or in accordance with the circular of instructions issued by the Secretary of the Interior May 16, 1907, may consolidate their claims or locations to the extent of 2,560 acres of contiguous lands, the tract in its length not to exceed twice its width. This act of Congress does not impose a limitation upon consolidation as a right theretofore existing, but grants, as something new, the right to consolidate to a limited extent.

Recurring now to the act of 1904, and considering only its terms, we submit that it admits reasonably of no other construction than that which underlies the indictment in this case.

The act of 1904 in its first section provides "that any person or association of persons qualified to make entry under the coal-land laws of the United States" may make entry of coal lands in the district of Alaska.

This description of the persons qualified to make entry in itself tells us nothing, but refers us for information to the general coal-land laws. And the reference is to the entire body of those laws. The Alaskan law does not say "qualified to make entry under *the first section of* the coal-land laws of the United States." The court below, however, did say that. It read into the Alaskan law the words "*the first section of.*" The fourth section of the coal-land laws, section 2350, R. S., provides that "the three preceding sections shall be held to authorize only one entry by the same person or association of persons." This fixes a qualification. It is a qualification which eliminates, which lessens the number of persons who may make an entry, and this was intended; and so with respect to the qualifications of age and citizenship.

Taking, then, the entire body of the coal-land laws and the qualifications prescribed are threefold. The applicant must be an adult, a citizen, and one who has not already received the bounty he applies for.

The court below, ignoring section 4 of the general laws, says, "The prescribed qualifications are age and citizenship"; and he holds that possessing these any person may locate upon and enter coal lands in Alaska, and possessing these any person may buy claims without number. Quoting him precisely—

To say that a vendee of a qualified locator, to be entitled to receive a patent, must be a citizen or association of citizens *qualified as described to make an entry of coal land, and not disqualified by having exercised a right to acquire coal land from the Government*, infringes legislative power, for, in the guise of construction, a radical change in the law would be effected by the addition of requirements and restrictions which the law-making power did not put there. (R., 40, 41).

That is to say, that the law of 1904 admits to its benefits the persons who are *qualified* under the general laws, and does not exclude the persons who are *disqualified* under those laws. And, consonantly with this, one and the same person may, at one and the same time, be qualified and disqualified under the very same laws.

We can not understand how this may be. Qualified and disqualified can not consist together. They are necessarily exclusive, the one of the other. When the law prescribed age and citizenship as qualifications it by that act prescribed nonage and alienship as disqualifications. It adds nothing to the law, it makes no change in it, to say that a minor or an alien may not enter coal land. When the law prescribed as a

disqualification that the person had previously made an entry of coal land, it by the same act prescribed as a qualification that he had *not* previously made an entry of such land. What can be plainer than section 2350? "The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions."

And yet it is ruled that the persons thus elaborately excluded from the benefits of this law are "qualified" to receive them. Manifestly any person, although neither a minor nor an alien, who had already made an entry under this act, making application for a second entry, would meet with a refusal, if the whole truth were known. And why? Because he had no right to make the entry; the law forbade it as absolutely to him as to the minor and the alien.

Three persons are excluded from making entries under the coal-land laws—the minor, the alien, and the person who has already made an entry. That one is excluded because he has exercised and exhausted his rights, and the others because the law conferred no rights upon them, does not alter the fact that no one of the three can make an entry. They are legally incompetent, incapable, disqualified. The



sum of the argument is that a person forbidden by the laws from making an entry of coal lands is not qualified by the laws to make such entry.

The last section, number 4, of this act is in harmony with the first and was undoubtedly added from an abundance of caution to make sure that the limitations of the first section would be effective. It reads: "That *all* the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the District of Alaska."

Every provision of the general law is, then, a provision of the Alaskan law unless there be some which are in conflict with the latter law.

Is the provision of section 2350 which authorizes "only one entry by the same person or association of persons" in conflict with any provision of the Alaskan law?

The answer is obvious. It can be read into the Alaskan law at any point and nullify nothing that goes before and nothing that comes after. The Alaskan law, so far as direct expression is concerned, has nothing on this subject. The general law has a distinct provision. If there is conflict here it is the remarkable conflict between something and nothing. The general law speaks and the Alaskan law is silent. Is there conflict? The very purpose of the fourth section of the act of 1904 was to have the general law speak where the Alaskan law was silent. We must import into the Alaskan law every provision of the general law which can be put into it without

jostling out something already there. If section four does not mean this, it means nothing whatever; and if it does mean this, the restrictions upon entries under the general law apply to entries under the Alaskan law.

It is said, however, that the restrictions of the general law are by their own terms limited to entries under the first three sections of that law. Section 2350, containing the restrictions, reads:

SEC. 2350. *The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions, etc.*

The three preceding sections referred to were the only existing provisions of law authorizing the entry of coal lands in the United States when the Alaskan law was enacted. The effect of the law was precisely the same as if it had read "only one entry shall be made by the same person or association of persons." Section 2350 was section 4 of the original act of March 3, 1873, 17 Stat., 607. As enacted, the section read:

SEC. 4. *That this act shall be held to authorize only one entry by the same person or association of persons under its provisions; and no association of persons, any member of*

which shall have taken the benefit of this act either as an individual or as a member of any other association shall enter or hold any other lands under the provisions of this act, etc., etc.

Here the limitation upon entries is upon the entries made under "this act." Now, "this act" became part of the same law with the act of April 28, 1904, for the act of June 6, 1900, extended "this act" to the district of Alaska, and the act of 1904 was simply an amendment of the act of 1900.

But section 2350, R. S., is not verbally identical with section 4 of the coal-land law as originally enacted. The opening words of section 4, "*That this act*" were in the revision changed to "*The three preceding sections.*" And why? Simply to fit in with the formal scheme of the revision. At its first enactment the coal-land law was an entire act, while in the revision it is six sections of an act containing 5601 sections. There was no purpose to change the effect of the law and it was not changed. In the law as first enacted, in the law as contained in the revision, in the law as extended to Alaska, there was the provision that no person or association of persons could make more than one entry of the coal lands of the United States, and that is in the law of coal lands in force in Alaska, unless there is some provision in the act of 1904 with which it can not stand. There is no such provision.

The distinctive purpose of the Alaskan law was to authorize the entry of coal lands outside the region

of public survey. Beyond this the law had relation to the procedure of entry. It allowed a year as the time within which to file the notice of location, while the general laws allowed but sixty days for such purpose. The Alaskan law allowed three years within which the locator must pay for his land, while under the general laws the locator must pay within one year. This greater latitude of time was allowed because of local conditions requiring it for the various steps leading to final entry of the lands. But for a complete removal of all the restrictions upon the extent of the entry, or the number of entries to be made by one person, restrictions imposed when public coal lands were first opened for entry in 1873, and adhered to ever since and everywhere unless it be in Alaska, there is no reason apparent and against it, speak in unmistakable terms the first words and the last of this very act of 1904.

It is respectfully submitted that the judgment of the court below should be reversed.

F. W. LEHMANN,  
*Solicitor General.*

JULY, 1911.



## APPENDIX.

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### A.

House Report No. 1298, Fifty-eighth Congress, second session.

#### COAL-LAND LAWS IN ALASKA.

MARCH 2, 1904.—Referred to the House Calendar and ordered to be printed.

Mr. LACEY, from the Committee on the Public Lands, submitted the following report:

[To accompany H. R. 8869.]

The Committee on the Public Lands, to whom was referred the bill (H. R. 8869) to amend an act to extend the coal-land laws to the district of Alaska, approved June 6, 1900, beg leave to report that bill with the following amendments:

Strike out all of sections 2, 3, 4, and 5 of said bill.

Strike out the words "Sec. 6," on page 3, in line 14, and insert in lieu thereof the words "Sec. 2."

On page 1, in line 12, strike out the word "the," which immediately precedes the word "survey," and insert in lieu thereof "a."

We recommend that the bill as thus amended do pass. It is proper to state that this bill as thus amended will be exactly similar to a bill which was favorably reported from this committee during the second session of the Fifty-seventh Congress and which bill during that session passed the House.

Your committee therefore beg leave to adopt as the report on this bill, H. R. 8869, the former report of this committee on a bill in the same form as the bill as now proposed to be amended.



[House Report No. 3541, Fifty-seventh Congress, second session.]

The Committee on the Public Lands, to whom was referred the bill (H. R. 16946) to amend an act to extend the coal-land laws to the district of Alaska, approved June 6, 1900, beg leave to submit the following report and recommend that said bill do pass with amendment by way of a substitute.

This is a bill enacting that the coal-land laws shall be so amended as to provide for the special survey and entry of unsurveyed coal land in Alaska.

Your committee regard it as necessary and desirable that the coal-land laws applicable to Alaska shall be amended and modified so as to provide an adequate system of special surveys. The coal-land laws have already been extended to this district, but owing to the rules and regulations, and on account of the construction put upon these laws by the Land Department, they have in fact been inoperative, because they only provide for the location and entry of surveyed lands.

The public surveys have been extended by law to Alaska, but owing to the great expense of such surveys there has been but little done, and it is necessary, in order to render the coal available, that some method of special surveys should be provided for as applicable to coal lands.

After a careful review of the subject your committee have prepared a short and simple, though comprehensive, bill providing a method of survey for such lands, and they therefore report back the bill with amendment as follows:

Strike out all after the enacting clause and insert the following:

"That any person or association of persons qualified to make entry under the coal-land laws of the United States who shall have opened and improved a coal mine or coal mines on the unsurveyed public lands in the district of Alaska, and who may desire to enter and purchase the same according to the provisions of the said coal-land laws before the ex-

tension of the public-land surveys over the lands on which such mines are located, shall file in the proper land office an application to enter the lands held and claimed by them, together with a plat and field notes of a survey of the same made under the direction of the surveyor-general of the district of Alaska, showing the boundaries of said tracts and their location as regards permanent natural landmarks or other surveys. All tracts shall be rectangular in form, containing forty, eighty, or one hundred and sixty acres, and distinctly marked by monuments on the ground, and the boundaries of the same shall be true east and west and north and south lines as nearly as practicable. Upon presentation of the said plat and field notes the application, if otherwise regular, shall be accepted as though the tracts sought to be entered were embraced within the regular public-land surveys.

"SEC. 2. That the Secretary of the Interior shall make all necessary rules and regulations for the purpose of carrying into effect the provisions of this act."

## B.

House Report No. 1863, Fifty-eighth Congress, second session.

### COAL LANDS OF ALASKA.

MARCH 23, 1904.—Committee to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. LACEY, from the Committee on the Public Lands, submitted the following report:

[To accompany S. 2814.]

The Committee on the Public Lands, to whom was referred the bill (S. 2814) to amend an act entitled "An act to extend the coal-land laws to the District of Alaska," approved June 6, 1900, having had said bill under consideration, beg leave to submit the following report:

This bill is similar to House bill 8869, now upon the House Calendar, and as the House bill carries with it the essential provisions contained in the Senate bill your committee therefore recommend that said Senate bill be amended by striking out all after the enacting clause and inserting in lieu thereof the language of the House bill, which is as follows, to wit:

That any person or association of persons, qualified to make entry under the coal-land laws of the United States, who shall have opened and improved a coal mine, or coal mines, on the unsurveyed public lands in the district of Alaska, and who may desire to enter and purchase the same, according to the provisions of the said coal-land laws, before the extension of the public-land surveys over the lands on which such

mines are located, shall file in the proper land office an application to enter the lands held and claimed by them, together with a plat and field notes of a survey of the same made under the direction of the surveyor-general of the district of Alaska, showing the boundaries of said tracts and their location as regards permanent natural landmarks, or other surveys. All tracts shall be rectangular in form, containing forty, eighty, or one hundred and sixty acres, and distinctly marked by monuments on the ground, and the boundaries of the same shall be true east and west and north and south lines as nearly as practicable. Upon presentation of said plat and field notes the application, if otherwise regular, shall be accepted as though the tract sought to be entered were embraced within the regular public-land surveys.

SEC. 2. That the Secretary of the Interior shall make all necessary rules and regulations for the purpose of carrying into effect the provisions of this act.

We recommend that the bill as amended do pass. It is proper to state that this bill as amended will be found similar to a bill which was favorably reported from this committee during the second session of the Fifty-seventh Congress, and which bill during that session passed the House.

C.

Calendar No., 1146.

Senate Report No. 1188, Fifty-eighth Congress, second session.

TO EXTEND THE COAL-LAND LAWS TO ALASKA.

MARCH 2, 1904.—Ordered to be printed.

Mr. NELSON, from the Committee on Public Lands, submitted the following report:

[To accompany S. 2814.]

The Committee on Public Lands, to which was referred the bill (S. 2814) to amend an act entitled "An act to extend the coal-land laws to the district of Alaska," approved June 6, 1900, have had the same under consideration and report it back with an amendment, and recommend that the bill as amended do pass.

The amendment recommended is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty (40), eighty (80), or one hundred and sixty (160) acres, with north and south boundary lines according to the true meridian, by marking the four corners thereof with permanent monuments so that the boundaries thereof may be readily and easily traced,

and all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in the recording district and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States may receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated, an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor-general for the district of Alaska, a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises, for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for, and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title acquired to the shore of any navigable waters within said district.

SEC. 3. During such period of posting and publication, or within thirty days thereafter, any person or



association of persons having or asserting any adverse interest or claim to the tract of land, or any part thereof, sought to be purchased, shall file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

SEC. 4. That all of the provisions of the coal-land laws of the United States, not in conflict with the provisions of this act, shall continue and be in full force in the district of Alaska.

The proposed amendment is in accordance with the recommendation of the Commissioner of the General Land Office, the only change made being in the last section, namely, in the omission of the words "and no coal shall be mined for sale outside of said district until a patent shall have issued for the land from which it is mined." The committee do not deem it wise to place this restriction upon the disposal of coal mined in Alaska before issuance of patent.

There is a pressing need of legislation of the kind suggested in the proposed bill. As the laws now stand claimants can not secure title to coal lands in Alaska. The measure was referred to the Commissioner of the General Land Office, and appended herewith is a copy of his report upon the same.

DEPARTMENT OF THE INTERIOR,  
*Washington, February 10, 1904.*

SIR: I have the honor to acknowledge the receipt, by reference from the Senate Committee on Public Lands, of a copy of S. 2814, entitled "A bill to amend an act entitled 'An act to extend the coal-land laws to Alaska,' approved June 6, 1900."

In response to the request for the views of this Department thereon, I inclose copy of a report from the Commissioner of the General Land Office, dated the 1st instant, submitting as a substitute for S. 2814, draft of a bill which he thinks will fully cover the needs of that Territory.

I concur in the views of the Commissioner.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

The CHAIRMAN OF THE COMMITTEE  
 ON PUBLIC LANDS, SENATE.

DEPARTMENT OF THE INTERIOR,  
 GENERAL LAND OFFICE,  
*Washington, D. C., February 1, 1904.*

SIR: I have the honor to acknowledge the receipt by reference, under date of January 12, 1904, by the Acting Secretary, for report in duplicate and return of papers of Senate bill No. 2814, Fifty-eighth Congress, second session, entitled "A bill to amend an act entitled 'An act to extend the coal-land laws to the district of Alaska,' approved June 6, 1900."

The bill referred to is as follows:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person, or association of persons, qualified to make entry under the coal-land laws of the United States, who shall have opened and improved a coal mine, or coal mines, on the unsurveyed public lands in the district of Alaska, and who may desire to enter and purchase the same, according to the provisions of the said coal-land laws, before the*

extension of the public-land surveys over the lands on which such mines are located, shall file in the proper land office an application to enter the lands held and claimed by them, together with a plat and field notes of the survey of the same, made under the direction of the surveyor-general of the district of Alaska, showing the boundaries of said tracts and their location as regards permanent natural land-marks, or other surveys. All tracts shall be rectangular in form, containing forty, eighty, or one hundred and sixty acres, and distinctly marked by monuments on the ground, and the boundaries of the same shall be true east and west and north and south lines, as nearly as practicable. Upon presentation of said plat and field notes the application, if otherwise regular, shall be accepted as though the tract sought to be entered were embraced within the regular public-land surveys.

"SEC. 2. That six months' preference right shall be allowed to the actual settler or claimant who has located or staked coal lands, either by himself or agent at the date of the passage of this Act, to file his declaratory statement and enter said lands.

"SEC. 3. That five years from and after the expiration of the period allowed for filing the declaratory statement and making entry is allowed claimant in which to make proof and payment for said lands, provided the claimant shall cause to be performed at least one hundred dollars' worth of labor or improvements during each of said years upon such claim.

"SEC. 4. That upon filing of the declaratory statement and application to enter lands, together with the plat and field notes of the same, under the provisions of this Act, the register and receiver of the land office shall issue to claimant a certificate setting forth the facts of said entry, and of the right of claimant to purchase the same; and thereafter the claimant will be entitled to sell and transfer his right to purchase said land, and the purchaser be entitled to make due proof and payment therefor under the provisions of this Act in the same manner as the

original claimant; and nothing in this Act shall prevent a bona fide purchaser for value from making proof and payment for more than one claim so purchased, provided the original claimant was qualified under the law to enter and purchase coal lands.

"SEC. 5. That the price to be paid to the receiver for said coal lands taken under this act shall not be less than five dollars per acre.

"SEC. 6. That the Secretary of the Interior shall make all necessary rules and regulations for the purpose of carrying into effect the provisions of this act."

The general coal-land laws were extended to Alaska by the act of June 6, 1900 (31 Stat. L., 658), and by section 2401 of the Revised Statutes, as amended by act of August 20, 1894, it is provided:

"When the settlers in any township not mineral or reserved by the Government, or persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof, or when the owners or grantees of public lands of the United States, under any law thereof, desire a survey made of the same under the authority of the surveyor-general, and shall file an application therefor in writing, and shall deposit in a proper United States depository to the credit of the United States a sum sufficient to pay for such survey, together with all expenditures incident thereto, without cost or claim for indemnity on the United States, it shall be lawful for the surveyor-general, under such instructions as may be given him by the Commissioner of the General Land Office, and in accordance with the law, to survey such township or such public lands owned by said grantees of the Government, and make return therefor to the general and proper local land office: *Provided*, That no application shall be granted unless the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys."

Under this quoted section it is possible for coal claimants on unsurveyed lands within the scope of

the subdivisonal surveys to have the lands claimed by them surveyed and make entry thereof, but as no township or subdivisonal surveys have been made, nor any standard lines or bases for township and subdivisonal surveys established within the district of Alaska, coal claimants there under the laws as they now stand can not secure title to the lands claimed by them.

The situation and needs of the local miner in Alaska, as well as those of nearly every other enterprise, are so different from those in the United States as to call for radical differences in the law. It is proposed to require the filing of a declaratory statement with the register and receiver within six months after the date of actual possession and commencement of improvements, or after the passage of the act as to those who are now in possession of such lands, which would in many instances be an absolute impossibility.

Some of the deposits of coal, now protected by section 2348, Revised Statutes, are many thousands of miles from the local land office at Juneau, Alaska. If the owners of such claims should happen to be outside of Alaska at the time of the passage of the act it might be impossible for them to reach the land to make the necessary markings and the land office to file within the time prescribed. It is therefore thought that at least one year should be allowed to file the declaratory statement or the location notice. It should be borne in mind that the greater portion of Alaska is almost inaccessible except during three or four months in the summer time.

It is also required that the declaratory statements be accompanied by field notes and plat of an official survey of the land. The claimant should not be put to this unnecessary expense at this time, as it would seem that a sufficient informal description might be incorporated in the declaratory statement or location notice in lieu of the description by legal subdivisions, as is done in mining locations covering unsurveyed lands, the official survey contemplated by the act to be

made when the claimant files his application to purchase.

In my judgment, a claim to coal lands should be initiated in a manner similar to that under which a homestead entry is now initiated. A homestead claimant makes his settlement and files a notice thereof in the required district in which it is situated. He thereafter, after the expiration of the proper period, causes a survey to be made and forwards it for approval to the surveyor-general. After it has been approved he presents a copy thereof, with his application, to the register and receiver, who thereupon, after proper notice and proof, allow the entry.

It should be constantly borne in mind that the making of surveys in Alaska is difficult and very expensive. For this reason and to encourage the development of coal mines, I think the expense should be lessened as much as possible. For that reason the claimant should be permitted, at the time of his location, to mark his own boundaries, to file his notice in the recording district, and for greater safety and for larger information for the public, should file a copy of it with the register and receiver. He should then be permitted to make his own survey or have it made, prepare and file his own plat and field notes or have them prepared and filed with the surveyor-general, and after that is done he can present his application to enter.

The third section of the bill allows five years from and after the time specified for filing the declaratory statement within which to make proof and payment, with the requirement of an annual expenditure in labor or improvements of \$100 for each claim. The general coal-land law allows a period of one year, which has been found ample in the territory affected thereby, for the purpose of permitting the claimant to determine by development whether the land is worth purchasing. It is feared that if the length of time proposed by the bill be allowed it will result in the public lands in Alaska being exhausted of their coal deposits without adequate compensation to the



Government therefor. The experience under the present coal-land law has been that parties file on coal lands, mine coal thereon for a year, fail to purchase within the period prescribed by statute, and have others file upon them in the same interest, thus avoiding payment to the injury of other citizens who desire to purchase, and to the Government, which loses the price of the land.

However, as to coal lands in Alaska, the claimant should be allowed at least three years in which to do this, because conditions are such that in many of these mines only a few months' development work can be done each season. The difficulty in having surveys accurately made consumes a great deal of time and with a limitation upon the power to export coal, no great damage can be done by its sale prior to the issuance of patent. If the miner in northern Alaska must first have his survey made by a regular deputy surveyor under orders from the surveyor-general, he must first send his application to the surveyor-general at Sitka, who will thereupon take proper steps to have the survey made and forward in advance the number it is to receive. An application of this kind could not leave northern Alaska, except by dog team, prior to about the 1st of July. It would require at least one month, if not longer, for this application to reach the surveyor-general and the surveyor-general's reply to reach the surveyor.

It would of course be possible to apply for and make this survey in one season, but the large probabilities are that it would require more than one season to have the survey finally approved by the surveyor-general. I can see no necessity for fixing an expenditure of any specific amount in labor or improvements, inasmuch as the present coal-land laws and regulations give a preference right of purchase to the one who, by "priority of possession and improvement, followed by proper filing and continued good faith," shows himself entitled; but in lieu of such requirement, I would suggest a clause prohibiting the mining, upon the land claimed, of coal for sale outside of

Alaska prior to the date of making proof and final payment therefor.

The fourth section of the bill allows but one filing to the individual, but permits the assignee of a declarant to purchase as many claims as he desires. In my opinion the enactment of this section would be in the interest of the speculator and capitalist and permit of the acquisition of valuable coal lands in vast tracts, thus creating monopolies which the existing coal-land laws were intended to prevent.

Inasmuch as no record of coal filings can be kept in the local land office and in the recorder's office, other than the declaratory statements filed, and as the descriptions in these will in many cases be quite indefinite, persons desiring to file or to make entry of coal lands, or parties claiming adversely, or the office in passing upon the same will not be able to determine whether or not conflicts exist.

Publication is not required in coal cases under the existing law; but in view of the difficulty of identifying coal lands in Alaska, taken by metes and bounds, it is thought that the act should contain a requirement of publication and posting of notice as a basis for final proof and payment.

The legislation heretofore enacted permitting the entry of lands for purposes of trade and business and as homesteads in Alaska provides for the filing of notice thereof with the district recorder, the survey thereof, and the adjudication of adverse claims in the courts. (See act of May 14, 1898, 30 Stat. L., 409, and act of March 3, 1903, 32 Stat. L., 1028.) It is thought that in addition to similar provisions respecting matters of record and survey any legislation affecting coal lands in that territory should specify the same method for the assertion and determination of adverse claims.

There would appear to be no good reason why the coal lands of Alaska should not be sold at the minimum price fixed by the existing coal-land laws, and any legislation should contain a provision relative to the 60-foot roadway along the shores of navigable

waters which it seems to have been the policy of Congress to reserve.

I therefore have the honor to submit herewith, as a substitute for Senate bill 2814, the following draft of bill which it is thought fully covers the needs of that territory:

A BILL to authorize the entry of unsurveyed public lands in the district of Alaska under the coal-land laws.

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

"SECTION 1. That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty (40), eighty (80), or one hundred and sixty (160) acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments so that the boundaries thereof may be readily and easily traced, and all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in the recording district and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

"SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States may receive a patent to the lands located by presenting at any time within three years from the date of such notice to the register and receiver of the land district in which the lands so located are situated, an application therefor accompanied by a certified copy of a

plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for, and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

"SEC. 3. During such period of posting and publication, or within thirty days thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land, or any part thereof sought to be purchased, shall file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

"SEC. 4. That all of the provisions of the coal-land laws of the United States, not in conflict with the provisions of this act, shall continue and be in full force in the district of Alaska, and no coal shall be mined

for sale outside of said district until a patent shall have issued for the land from which it is mined."

The papers accompanying the reference of the Acting Secretary are herewith returned.

Very respectfully,

W. A. RICHARDS,  
*Commissioner.*

THE SECRETARY OF THE INTERIOR.

## D.

### CONSTRUCTION OF THE ACT OF APRIL 28, 1904.

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[Decision of the Commissioner of the General Land Office approved by the Secretary of the Interior in case of *U. S. v. Scofield et al.*]

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It is well established that the acts of Congress granting portions of the public lands for any cause or providing for their disposition shall be strictly construed and that the grant shall not be enlarged by implication.

The Supreme Court in the case of *Wisconsin Central Railroad v. The United States* (164 U. S., 190), held:

Statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee.

And in the earlier decision of *Rice v. Railroad Co.* (1 Black, 358):

Legislative grants must be interpreted if practicable so as to effect the intention of the grantor, but if the words are ambiguous the true rule is to construe them most strongly against the grantee. Whatever privileges are granted to a corporation and the grant comes under the revision of the courts it is to be construed strictly against the corporation and in favor of the public, and nothing passes except what is given in clear and explicit terms.

In *Leavenworth, Lawrence & Galveston Railroad Co. v. The United States* (92 U. S., 733), it was declared:

Where rights claimed under the United States are set up against it, they must be so clearly defined



that there can be no question of the purpose of Congress to confer them. The rule announced in the former decisions of this court, that a grant by the United States is strictly construed against the grantee applies as well to grants to a State to aid in building railroads as to one granting special privileges to a private corporation.

In the case of *Blair v. Chicago* (201 U. S., 400), the court considered the question of the construction of statutes granting franchises, and declared the rule to be (syllabus):

One asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied.

And the court quoted with approval from the case of the Binghampton Bridge (3 Wall., 51), in which it was held:

The principle is this, that all rights which are asserted against the State must be clearly defined and not raised by inference or presumption, and if the charter is silent about a power it does not exist. If on a fair reading of the instrument reasonable doubts arise as to the proper interpretation to be given it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.

The court in the further consideration of the case of *Blair v. Chicago*, referring to the rule in the Binghampton Bridge case, set forth above, said: "This principle has been declared axiomatic as a doctrine of this court," and cited *Fertilizing Co. v. Hyde Park* (97 U. S., 659); *Slidell v. Grandjean* (111 U. S., 412);

*Coosaw Mining Co. v. South Carolina* (144 U. S., 550); and *Knoxville Water Co. v. Knoxville* (200 U. S., 22).

The case of *Slidell v. Grandjean*, cited with approval in *Blair v. Chicago*, was one arising under the public-land laws, and the court considered therein the effect of a land grant, and in disposing of the case used this language:

It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties, and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. (*Charles River Bridge v. Warren Bridge*, 11 Pet., 420, 536; *Dubuque & Pacific Railroad Co. v. Litchfield*, 23 How., 66, 88; the *Delaware Railroad Tax*, 18 Wall., 206.) The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.

The Supreme Court in the case of *Morton v. Nebraska* (21 Wall., 660) considered the question whether saline lands in the district of Nebraska might be taken by military bounty land warrants which were locatable on lands subject to private entry, and pointed out that it had been the policy of the Government since the acquisition of the Northwest Territory and the inauguration of the public-

land system to reserve salt springs from sale, and concluded:

An intention to abandon a policy which had secured to the States admitted before 1854 donations of great value can not be imputed to Congress unless the law on the subject admits of no other construction.

In *Mining Co. v. Consolidated Mining Co.* (102 U. S., 167) the question before the court was whether a grant to California of sections 16 and 36 embraced mineral lands, and the court held:

Such lands were by the settled policy of the General Government excluded from all grants.

The court discussed at some length the conditions under which California was settled and the history of mining in that section. It noticed that Congress did not until 1866, or subsequent to the admission of the State of California and the date of the grant in question, pass any general mining law, notwithstanding that mines of great value were being operated and that the rights of many people were unsettled. The court decided that while Congress had not enacted into law any general plan by which title to mineral lands could be acquired, it was its policy to reserve those lands until such time as it saw proper to adopt a system for their disposition, and said:

We are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

Coming directly to the act under consideration it is observed that in 1873 the Congress formulated its policy as to the disposition of the public coal lands of the United States; the laws relating thereto were codified and carried into the revision of the statutes in 1874 under sections 2347 to 2352, inclusive. These

laws were extended to Alaska by the act approved June 6, 1900 (31 Stats., 658); and under a title declaring it to be an amendment of existing law, the act of April 28, 1904 (33 Stats., 525), was passed providing that any person or association of persons qualified to make entry under the coal-land laws of the United States who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska may locate the lands upon which such mine or mines are situated, in rectangular tracts containing 40, 80, or 160 acres. Then followed provisions under which these unsurveyed lands might be marked by private survey and the lands as thus identified entered and patented. The price of the land was fixed at the flat rate of \$10 per acre, and substantially the system then existing for the ascertainment of homestead and mineral conflicts was provided. Not only was the act upon its face and by its title an amendment of the then existing laws, but section 4 thereof specifically provided:

That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the District of Alaska.

It is urged that section 4 adds nothing to the act; but, even though it be conceded that it would be the duty of the land department and of the courts to read section 4 into the act if it had been omitted therefrom, it is significant that Congress saw fit to add the section, and by so doing it emphasized its will that the act in question should not be held to abrogate or repeal existing law any further than was therein directly expressed.

The Supreme Court in the case of *Blair v. Chicago* (201 U. S., 400), quoted with approval and adopted the rule announced in *People v. Circuit Judge* (37 Mich., 287):

As a rule of construction a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended.

The law as it had been extended to Alaska prior to the date of the amendatory act contained strict provisions preventing one person from securing from the Government more than 160 acres of its public coal lands, an association of two or more persons more than 320 acres, and four or more persons who had expended in opening and improving a mine the sum of \$5,000 an area not greater than 640 acres. There is nothing whatever in the act of 1904 to indicate that it was the purpose of Congress to depart from its established policy. It proceeded to give relief to the pioneers in Alaska by amending existing law so as to provide a means by which those duly qualified who had opened or improved or who thereafter might open or improve a mine or mines of coal on the public lands situated there, even if unsurveyed, could locate the land in tracts of 160 acres or less and through their own efforts secure the identification thereof in such manner as to permit the claims to pass to patent. It was a well-known fact that while the coal-land laws had been extended to Alaska in all their force and effect, that as a practical question the titles could not be acquired as the lands were not surveyed and the vast extent of that country precluded the possibility that the regular system of surveys could be extended over all that country for years to come. The fact that after providing these special methods by which

the patents could be obtained and after reciting that those who made the locations must possess the qualifications necessary to enter coal lands in the United States, it was expressly declared that all the laws not inconsistent with that act should remain in full force and effect, strongly argues that Congress did not intend to remove all restrictions so as to permit the unsurveyed coal lands in Alaska to be acquired in unlimited quantities. It is inconceivable that Congress intended the lands in Alaska thereafter surveyed should be disposed of under the strict provisions of sections 2347 to 2352 and that the unsurveyed lands might be appropriated without reference whatever to the limitations of said act. If it had been the purpose of Congress to repeal the section of the law aimed at the prevention of monopoly, it could have manifested its will in language that would have left nothing to construction. The policy which governed in the disposition of coal lands had been recognized by the Supreme Court in the case of *United States v. Trinidad Coal Co.* (137 U. S., 160). The limitations in the law had been declared by the land department in decisions too numerous to be cited. The Congress, therefore, understood the construction that had been given the existing acts both by the department whose duty it was to dispose of the lands in accordance with its mandate and by the highest court of the land when called upon to declare the law.

That it was not the intention of the Congress to adopt a new policy with reference to Alaska which would permit the coal lands there to be monopolized is clearly indicated by the reports made to that body prior to the enactment of the law of 1904 and the history of the legislation; and that it was not so



understood is shown by the regulations issued by the department for carrying said act into effect under date of July 18, 1904 (33 L. D., 114). In the regulations above mentioned it is said:

Persons or associations of persons locating coal lands in the District of Alaska under this provision of the act are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States. And the requirements in this particular are to be found in the coal-land circular approved July 31, 1882 (1 L. D., 687), paragraphs 30 and 31, amended (32 L. D., 382).

Thus it will be seen that the department contemporaneously with the approval of the act construed it to mean that the same qualifications to locate and perfect entries to coal lands obtained in Alaska as in the United States. Moreover, it is provided in the regulations of Commissioner Ballinger, approved by Secretary Garfield, promulgated April 12, 1907:

That persons or associations of persons locating or entering coal lands in the District of Alaska under the provisions of the act of April 28, 1904 (33 Stats., 525), amendatory of the act of June 6, 1900 (31 Stats., 658), are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States, and are subject to the same limitations.

And section 5 of said regulations provided:

But one entry of coal lands by any person or association of persons is allowed by the law. No person who and no association any member of which either as an individual or as a member of an association shall have had the benefits of the law may enter or hold any other coal lands thereunder. The right so to enter or hold is exhausted whether an entry embraces in any instance the maximum area allowed by the law or less.

That Congress did not intend to authorize one person or an association of persons to acquire coal lands in Alaska in unlimited quantities, by the approval of the act of April 28, 1904, is evidenced by the later act approved May 28, 1908, entitled "An act to encourage the development of coal deposits in the Territory of Alaska," because it is provided in the later act—

That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made location of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, \* \* \* may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands not exceeding in length twice the width of the tract thus consolidated.

It would have been idle for Congress to have passed an act permitting the consolidation of claims if under previous law one person could acquire the lands in unlimited quantities. The act of 1908 clearly recognizes that the restrictions and limitations applicable to the United States at that time obtained in Alaska, and the object of the act was to grant relief and provide a means by which these claims could be consolidated and titles thereto acquired by the locators; and that the Congress did not intend to depart from its policy is shown by the drastic antimonopoly provisions in section 3 of the act of 1908.

The Attorney General under date of June 12, 1909 (38 L. D., 86), advised the Secretary of the Interior that a verbal agreement entered into between two or more entrymen prior to the location, that upon the issuance of patent the entries were to be consolidated and mined at the joint expense of each claim-

ant, share and share alike, was unauthorized under the law, and that such agreements were not validated or the locations confirmed by the provisions of the act of May 28, 1908, above referred to.

In the cases of *United States v. Charles F. Munday et al.*, and *United States v. Charles H. Doughton et al.*, decided recently by the United States Circuit Courts for the Western and Eastern Districts of Washington, respectively, there was a difference of opinion expressed by the courts as to the construction to be given some of the provisions of the act of April 28, 1904. The decision in the Doughton case sustained the Government's contention therein, but even though it be conceded that the decision adverse to the Government in the Munday case should ultimately prevail, it is not seen how it would affect the merits of this case. The decision in that case was predicated upon the theory that the several locations were lawful, while in this case it has been specifically alleged and proven that each location was unlawful because prior thereto each of the several locators had agreed and confederated together that all the land embraced by said several locations should be taken and held for the common use and benefit of all the claimants, a scheme which would permit an association of 33 persons to acquire for the common use and benefit of said association more than 5,000 acres of the public coal lands, whereas the act under which the locations were made authorized an association to secure under its special provisions only 160 acres of such land.

If the act of 1904 be regarded as an independent expression of the will of Congress and as constituting all the law applicable to Alaska coal lands, if the ordinary rules of construction between grantor and

grantee be applied, if the policy of the Government to prevent monopoly of its coal land be forgotten, if the contemporaneous constructions of Acting Commissioner Fimple and Acting Secretary Ryan and the subsequent regulations of Commissioner Ballinger and Secretary Garfield be not invoked, if the opinion of the Attorney General and the decision of Judge Rudkin in the Doughton case be not considered, and guided only by the express language of the Congress employed in this act, I could not hold the provision—

That any person or association of persons qualified to make entry under the coal-land laws of the United States who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty (40), eighty (80), or one hundred and sixty (160) acres—

authorized an association of 33 persons to acquire 5,250 acres of the public coal lands situated in the District of Alaska.



# In the Supreme Court of the United States

OCTOBER TERM, 1911.

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THE UNITED STATES,  
*Plaintiff in Error,*

vs.

CHARLES F. MUNDAY and  
ARCHIE W. SHIELS,  
*Defendants in Error.*

No. 593.

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BRIEF ON BEHALF OF CHARLES F. MUNDAY.

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A jury having been impaneled in the Circuit Court of the United States for the Western District of Washington in the above cause, and counsel for the Government having made an opening statement and produced and sworn its first witness, the defendants moved the Court for a directed verdict. After argument of the said motion the Court delivered an opinion sustaining the contentions of the defend-

ants as to the proper construction of the indictment and of the statutes upon which it is based, but holding that because of the allegation in the indictment as to the alien character of the Pacific Coal & Oil Company, the motion should be denied. Thereupon, the United States, through its counsel, made the following statement of record:

"That the record made here, and the decision rendered here, may be reviewed as speedily as possible by the Supreme Court, and the questions raised here may be settled for all time to come, the Government does now and here abandon for all time the charge in the indictment of the foreign or alien character of the Pacific Coal and Oil Company as an element of the crime sought to be charged by the indictment."

The indictment having been dismissed as to the defendant Siegley, the defendants Munday and Shiels thereupon made the following motion:

"Defendants now move the court that the indictment be quashed and that the defendants be discharged upon the following grounds:

1. That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the United States, nor with the violation of any law of the United States.

2. That the said indictment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States.

3. That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States."

To obviate any question of double jeopardy, one of the jurors was thereupon excused and withdrawn.



In disposing of the foregoing motion the Court made and entered the following ruling and judgment:

"The motion made on behalf of the defendants is granted by the Court; the indictment is quashed and the defendants are discharged.

It is therefore now considered, ordered, and adjudged by the Court that the indictment in this cause be, and the same hereby is, quashed, and that said defendants Charles F. Munday and Archie W. Shiels of and from the premises in said indictment specified be discharged and go hence hereof without day."

A written decision was made and filed by the Court, in which the indictment upon which this prosecution is based was analyzed and construed as follows:

"The indictment names the three defendants on trial and one Algernon H. Stracey as the persons implicated in the conspiracy charged.

King County, in the State of Washington, and the 1st day of May, 1905, are specified as the place and time of the formation of the alleged criminal combination.

The general charge of the indictment is that the four persons named, with divers other unknown persons, did unlawfully (omitting other adjectives), combine, confederate, and agree together to defraud the United States of America of the use and possession of and title to large tracts of valuable coal lands then and there part of the public domain of the United States situated within the Kayak recording district of Alaska, being contiguous tracks and parcels of coal lands collectively and commonly known as the 'Stracey Group.'

The indictment specifies that the lands referred to were subject to location and entry under the coal-land laws of the United States applicable to Alaska, and subject to the several attempted locations and

entries in a subsequent part of the indictment specified, except for the unlawful, fraudulent, false, feigned, and fictitious character of said attempted locations and entries; and that the value of said lands is ten million dollars.

The indictment contains other specifications of the nature of the intended fraud, some of which, however, are comprehended within the general charge of the purpose to defraud the United States by divesting the Government of its title to, and proprietary rights in the coal lands designated, and therefore do not merit additional mention.

Other specifications of fraud are to the effect that the scheme included interference with the administration of the land business of the United States by deceiving the officers and agents of the Government, in order to induce them to approve the several locations and entries and issue patents conveying the title to the coal lands designated.

The gravamen of the charge is an unlawful conspiracy to obtain coal land in Alaska for the Alaska Development Company, a corporation of the State of Washington, and the Pacific Coal & Oil Company, reputed to be a corporation organized and existing under the legal authority of some foreign government, to-wit, the Dominion of Canada or one of its Provinces, the quantity of land so to be obtained for said corporations being in excess of the quantity which the law permits.

The several tracts of coal land to be acquired pursuant to the alleged conspiracy are forty in number, each being specifically described and identified as a coal claim, bearing the name of the individual, locator, and claimant thereof, and by a serial number and by the area thereof expressed in acres and fractions of an acre, each claim being approximately 1/4 of a section.

The plan or scheme embodying the means whereby the object of the alleged conspiracy was to be accomplished are set forth with particularity in ar-

ticulated paragraphs which I have epitomized as follows:

The objects and purposes of said unlawful conspiracy were to be furthered and effected by means of unlawful, fraudulent, false, feigned, and fictitious locations, notices of locations, preferential rights to purchase, applications to enter and purchase, and final entries and purchases under the coal-land laws of the United States; by cunning persuasion and promises of pecuniary reward and other corrupt means persons severally qualified by law (except as stated) should be procured and induced to make the fictitious locations and fraudulent entries of said tracts of coal lands ostensibly for the exclusive use and benefit of themselves respectively, but in truth and in fact for the use and benefit of the Alaska Development Company and the Pacific Coal & Oil Company; the possession of all of said coal lands was to be held and the use thereof enjoyed by persons ostensibly as the agents of, and for the benefit of the individual claimants, respectively, but in truth and in fact as the agent of and for the use and benefit of said corporations; each claimant should be induced, persuaded, and procured to support his unlawful location and fraudulent entry by affidavits regular in form but containing false representations; that each of them, respectively, had opened and improved a coal mine and expended moneys in that behalf and staked out and located a coal claim including within its boundaries said coal mine, and had taken and held possession of said coal claims and intended to purchase from the United States under and pursuant to the coal-land law applicable to Alaska the tract of land so pretended to have been located. By said means the officers of the United States having charge of public-land matters should be deceived and induced to accept, file, and record notices of location and affidavits in the land office, and to segregate said coal lands from the public domain and withdraw the same from public entry under any of the public land laws of the United

States, and rights should thereby be acquired, ostensibly for the benefit of the persons making such false affidavits, but in fact for the said corporations. Thereafter said coal-land claimants, respectively, should hold and exercise their pretended and unlawful preferential rights to purchase said coal lands, ostensibly for their own use and benefit, but in fact for the said two corporations. Thereafter said claimants should, in the form and manner provided by law, make applications to enter and purchase said coal lands, ostensibly for their own use and benefit, but in fact for the said two corporations, and thereby the said corporations should receive and enjoy the benefits of a greater number of locations and entries of coal lands and for a greater quantity of coal lands than allowed by law. The respective shares and interests of said Alaska Development Company and of said Pacific Coal & Oil Company in the fruits and benefits of the unlawful conspiracy were to be adjusted so that said Alaska Development Company should receive and enjoy the title, use, and value of all of said coal lands, subject to a contract entered into between said two corporations prior to the transactions, and which was in full force and effect at and during all of the times mentioned, by which it was provided that, as between said corporations, the Pacific Coal & Oil Company should be entitled to take and hold possession of said coal lands, operate the mines thereon, and extract the coal therefrom, paying a royalty therefor to said Alaska Development Company, and have an option to purchase all of said coal lands within certain stated times and for certain stated prices.

Overt acts are charged, substantially as follows:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect its object, Archie W. Shiels, one of the defendants, did unlawfully on specified dates cause each of the said coal claims to be surveyed by a mineral surveyor of the United States. Said survey being intended for use in applications to enter and purchase the said coal

claims by the respective claimants thereof, and thereafter in further pursuance of and to effect the object of said unlawful conspiracy, the said Shiels did knowingly on specified dates file and cause to be filed in the office of the surveyor general of the United States for Alaska each and all of the said official surveys and field notes thereof. The indictment then sets forth in tabulated form a list of the claims surveyed, with the dates on which the surveys were made and the filing dates, said claims being forty in number and identified by the names of the claimants as the same claims previously mentioned. The indictment then alleges a number of other overt acts in furtherance of and to consummate the conspiracy indicating that the scheme was carried out to the extent of filing applications to purchase said claims by each of the locators and payment of the Government's price to the officers of the local land office for the District of Alaska, in which the lands are situated, and that in the transaction of said business the defendants, or one of them, acted as attorney or agent of all of the locators. The indictment alleges other transactions subsequent to the first day of January, 1910, including written communications referring to money advanced by the Pacific Coal & Oil Company, for which security was to be taken in the form of mortgages to be executed by the several entrymen and payments of money to the receiver of the land office at Juneau, in payment of the Government price for a number of said coal claims. Finally the indictment charges that on a specified date, subsequent to January 1, 1910, one of the defendants paid to the receiver of the land office at Juneau the Government price for thirty-eight of said coal claims.

It is to be specially noted that the indictment does not charge that the several locators were dummies; on the contrary, it is expressly averred that they were each of them competent to make entries of coal lands in Alaska, and not disqualified except for particular reasons in the indictment specified, and it is not charged as one of those particular rea-



sons that their locations were illegal because of any failure to do the things which the law makes essential to the acquisition of rights as locators of coal land, nor that more than one coal right was to be or had been exercised by any one locator."

In further construing the indictment, the Court, after adverting to the coal-land act of April 28, 1904, said:

"Locators of coal claims in Alaska, under this law, have the right to use business sense, to look ahead and make arrangements for working capital, and to contract in advance for transportation facilities, and to sell or mortgage their claims. By mandatory words the law prescribes that the locator who meets the requirements prescribed shall receive a patent. He may sell his claim before obtaining the patent, and if he does so his vendee, if a citizen of the United States or an association of citizens, shall receive the patent. It is not to be inferred that the law will permit the acquisition of coal lands in Alaska through the medium of dummy entrymen. In land-office practice dummies are either fictitious persons or those who, having no interest in the transaction, permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfunctorily. A man who opens or improves a coal mine in Alaska and locates a claim in the form prescribed by the statute, including his improvements, and marks its lines and corners so that its boundaries can be readily traced on the ground, and posts and records a notice in conformity to the requirements of the statute, and is then competent and entitled to deal with the claim as his own property, to sell it, lease it, mortgage it, or keep it, and derive for himself all the profits and benefits to be derived from the most advantageous use or disposition of such property, is not a dummy entryman."

The indictment in this case attempts to charge a conspiracy to defraud the United States under Sec-



tion 5440 of the Revised Statutes. That statute so far as pertinent to the questions here involved is as follows:

"If two or more persons conspire \* \* \* to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty, etc."

The conspiracy to defraud is predicated upon an alleged combination between the defendants and others unknown, formed for the purpose of acquiring forty tracts of coal lands in the District of Alaska known as the Stracey group in violation of the coal-land laws of the United States, and particularly of the Act of April 28, 1904, and the alleged doing of certain acts to effect the object of such conspiracy. The writ of error in this case is prosecuted under and by virtue of the Act of Congress approved March 2, 1907, 34 Stat. 1246, which Act so far as here pertinent is as follows:

"That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."

It becomes apparent, therefore, that the sole questions which may be considered by this Court in this cause must arise out of and be based upon the con-

struction given by the Circuit Court of the statutes upon which the indictment is founded.

*United States v. Keitel*, 211 U. S. 397.

*United States v. Biggs*, 211 U. S. 518.

*United States v. Kissel*, 218 U. S. 606.

In *United States v. Keitel* (*supra*) this Court said:

“Finally we come to the two contentions of the Government which we have hitherto temporarily put aside, and to the various contentions on the part of the defendants in error, insisting either that the court below misconstrued the indictment, or that there were such defects in the indictment that it was rightly quashed, irrespective of the construction of the statutes which led the court below to do so. But we do not think we have jurisdiction on this writ of error to consider these questions. The right of the United States to come directly to this court because of the construction of the statutes by the court below, as we have previously said in considering the question of jurisdiction, is solely derived from the act of 1907, the text of which is printed in the margin. That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, and

also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

In *United States v. Biggs* (*supra*), this Court said:

"It is also settled by *United States v. Keitel, supra*, that the right given to the United States to obtain a direct review from this court of the rulings of the lower court on the subjects embraced within the statute of 1907 does not give authority to revise the action of the court below as to the mere construction of an indictment, and therefore in the exercise of our power to review on this record we must accept the construction of the indictment made by the lower court and test its construction of the statute in that aspect."

It must, therefore, be accepted as the settled rule of this Court that no inquiry can be here made as to whether the Court below erred in construing the indictment; but that, accepting its construction of the indictment, the inquiry is now confined to a determination of the question whether the Court so erred in construing the statutes upon which the indictment is based as to require a reversal of its judgment.

In the case of *Pettibone v. United States*, 148 U. S. 197, the Chief Justice, in defining the offense named in Section 5440 (*supra*), said:

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means."

The Court held that the gravamen of the charge in the indictment "is an unlawful conspiracy to obtain coal land in Alaska \* \* \* in excess of the quantity which the law permits." It is not charged that it was unlawful for the defendants to seek to obtain any coal lands in Alaska, but that they sought to defraud the Government by obtaining more lands than they might lawfully obtain by the means to be employed in effecting the objects of the alleged conspiracy. We come, therefore, to a consideration of the means and the overt acts charged, as the indictment is construed by the Court. The Court will take judicial notice that there are no public surveys in Alaska. The lands to be secured are described as "contiguous tracts and parcels of coal lands collectively and commonly known as the 'Stracey Group,' " and they are specifically described by the names of the locators and the serial numbers of the surveys. The lands are alleged to be coal lands, and therefore subject to location and entry under the coal-land laws of the United States applicable to Alaska. The locators are also alleged to have possessed the statutory qualifications, and it is not alleged in the indictment that the locators failed to comply with any of the statutory pre-requisites to a valid location. The four defendants named in the indictment, "with divers other persons to the said grand jurors unknown," are charged with having entered into a conspiracy. As construed by the Court the indictment does not charge the defendants with having conspired to hire or employ the locators to make the locations. In stating the objects of the conspiracy they are simply charged with having conspired by persuasion and promises of pecuniary reward to induce the locators of the several claims described to

take the necessary statutory steps to carry the several claims to patent for the ultimate use and benefit of the two corporations named in the indictment. And consistently therewith, the first overt act charged against the alleged conspirators was the making of the surveys upon which applications for patents were based. The Court expressly held that the indictment does not charge that the several locators were agents or dummies. On the contrary, it held that the law will not permit the acquisition of coal lands in Alaska through the medium of dummy entrymen; and that these locators having opened and improved coal mines in Alaska and located their claims in the form prescribed by the statute were entitled to deal with the claims as their own property and to derive for themselves all the profits and benefits to be derived from the most advantageous use or disposition of such property, and were not dummy entrymen.

The question here involved, therefore, is whether the defendants have committed any violation of the express provisions of the coal-land laws applicable to Alaska in conspiring together to acquire coal lands in Alaska by persuading and inducing qualified persons, who made locations of coal claims in that territory for their own benefit in compliance with the formalities of the statutes and upon lands subject to the operation of the law, to take the statutory steps requisite to obtain patents for the use and benefit of the corporations named. To determine whether the Court below committed a reversible error in quashing the indictment, it becomes necessary for this Court to consider and construe these laws; since, as we have seen, its power to review upon this writ depends alone upon the error, if any, of the Court below in the construction given to these laws. If the Court

rightly construed these laws, the indictment neither charges an unlawful conspiracy to defraud the Government nor any overt act done in pursuance of an unlawful conspiracy.

#### HISTORY OF THE COAL-LAND LAWS.

In the determination of the questions here involved, it may be helpful to briefly review the history of the growth and development of the coal-land laws of the United States, including the acts of Congress peculiarly applicable to Alaska.

In explaining the language of the first coal-land act, it should be observed that the pre-emption law of 1841 excluded from its operation "lands on which are situated any known salines or mines" (R. S. §2258). It was, therefore, held that lands which contained known deposits of coal were not subject to entry under the pre-emption law. Accordingly, on the first day of July, 1864, Congress passed an act entitled, "An Act for the Disposal of Coal Lands and of Town Property in the Public Domain." This act so far as here pertinent provided:

"That where any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which, as 'mines,' are excluded from the pre-emption act of eighteen hundred and forty-one, and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum."

On March 3, 1873, Congress passed the act now



commonly known as the coal-land law of the United States (17 Stat. 607); which law was embraced in the Revised Statutes of 1873, under the chapter devoted to "Mineral Lands and Mining Resources," as §§ 2347 to 2352, inclusive, of said Revised Statutes.

Since the passage of these laws coal lands have been uniformly treated as mineral lands within the meaning of the statutes regulating the disposition of the public domain.

*Mullan v. United States*, 118 U. S. 271.

*Colorado Coal & Iron Co. v. United States*,  
123 U. S. 307.

*Pacific Coast Marble Co. v. Northern Pacific  
R. R. Co.*, 25 L. D. 233.

Case of T. P. Crowder, 30 L. D. 92.

Copp's Mineral Lands, pp. 61, 62.

On May 17, 1884, (23 Stat. 26) Congress passed the Organic Act providing a civil government for Alaska, which, among other things, provided in Section 8 that "The laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, \* \* \*. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

The first section of the general mining laws (R. S. §2318) provides that "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." And the second section (R. S. §2319) provides that "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and pur-

chase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, etc."

On July 24, 1897, Congress passed an act amending section 8 of the Organic Act providing a civil government for Alaska by authorizing the President to divide Alaska into land districts and appoint the officers thereof (30 Stat. 215).

The act of March 3, 1899, (30 Stat. 1098) provided that "the system of public land surveys is hereby extended to the district of Alaska."

On June 6, 1900, Congress passed an act entitled "An Act to extend the coal-land laws to the district of Alaska," in which it was declared "That so much of the public land laws of the United States are hereby extended to the district of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes" (31 Stat. 658).

On the same day Congress adopted a Civil Code for the district of Alaska, to which reference will be hereafter made.

Pursuant to the act extending the coal-land laws of the United States to the district of Alaska, the Department of the Interior promulgated its circular of instructions concerning the acquisition of title to coal lands in Alaska, dated June 27, 1900, in which it recites the act extending the coal-land laws to the district of Alaska, and also recites Section 2401 of the Revised Statutes, permitting township surveys in certain cases, provided that such townships are "within the range of the regular progress of the public surveys embraced by existing standard lines or

bases for township and subdivisional surveys." These departmental instructions conclude as follows:

"Although the system of public-land surveys was extended to the district of Alaska by a provision contained in the act of Congress approved March 3, 1899 (30 Stat. 1098), no township or subdivisional surveys have been made, nor have any standard lines or bases for township and subdivisional surveys been established within the district; therefore, until the filing in your office of the official plat or survey of the township, no coal filing nor entry can be made."

In the meantime qualified persons had entered upon the unsurveyed public lands in the district of Alaska and had discovered deposits of coal therein. They then attempted to locate coal claims on these deposits under the general mining laws, but these locations were rejected by the department on the ground that coal lands were not subject to entry thereunder. Congress, taking note of these conditions and for the purpose of relieving them, passed the act of April 28, 1904, (33 Stat. 525).

#### THE GENERAL COAL-LAND LAW.

(R. S. §§ 2347 to 2352, inclusive.)

In determining the questions here involved let us first consider the coal-land law of the United States as extended to Alaska, and endeavor to ascertain its proper construction in the light of the decisions of this Court. This law is as follows:

"Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of

the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Sec. 2349. All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Sec. 2351. In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

Sec. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper."

It will be observed that the first section of this act declares that "*Every* person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, \* \* \* shall \* \* \* have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person." Here is manifested the intention of Congress to confer upon every qualified person the right to make entry of public coal lands. The quantity of such lands which might be embraced in a given entry by such qualified person was in this grant expressly limited to one hundred and sixty acres.

The second section of the act (R. S. §2348) permitted any such qualified person to enter upon the public lands and to open and improve a coal mine and retain possession thereof, and conferred upon him, on these conditions, a preference right to make the cash entry. This preference right, under subsequent provisions of the act, might be continued for one year after "the filing of a declaratory statement therefor." As held in *United States v. Forrester*, 211 U. S. 399, these sections of the law conferred a mere privilege upon the declarator "to make the statutory entry of a particular tract of coal land in preference to others."

In the first three sections of the act nothing is said as to the number of entries that might be made by a qualified person; but in the fourth section (R. S. §2350) it is declared that "the three preceding sections shall be held to authorize only one entry by the same person." The cash entry thus authorized was to be made, upon application to the register of



the proper land office, by the payment to the receiver of the price at which the land might be valued by the Commissioner of the General Land Office, not less, however, than ten dollars per acre where the lands were situated more than fifteen miles from a completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Another phase of this law now requires consideration. Section 2347 provides that "any association of persons severally qualified as above, shall, \* \* \* have the right to enter, by legal subdivisions, any quantity of vacant coal-lands \* \* \* not exceeding \* \* \* three hundred and twenty acres to *such association.*" Section 2348 also confers upon any such association which shall have opened and improved a coal mine or mines, and shall be in actual possession of the same, the preference right to make entry thereof within the time and upon the conditions above enumerated. It also provides "That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, *such association may enter* not exceeding six hundred and forty acres, including such mining improvements." It is thus seen that in case of associations authorized to make cash entry the maximum quantity that may be legally embraced in a given entry is limited to six hundred and forty acres.

By the fourth section (R. S. §2350) the right conferred by the three preceding sections is likewise limited in the case of associations to a single entry, and it is further provided that "no association of persons, any member of which shall have taken the

benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions."

By the language above quoted it is plain, we think, that the term "association" was intended by Congress to mean a formal organization or body brought into being by qualified persons and which as such should be invested with the right of entry in its own name and for its own benefit.

The word "association" is a term "used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise."

*Allen v. Stevens*, 54 N. Y. S. 23.

*Pratt v. Roman Cath. Orphan Asylum*, 46 N. Y. S. 1035.

*Bouvier's Law Dictionary*, Vol. 1, p. 183.

The word "association" means a body of persons invested with some, yet not full, corporate rights and powers.

*State v. Taylor*, 7 N. D. 533, 64 N. W. 548.

In the case of *United States v. Trinidad Coal Co.*, 137 U. S. 160, in construing the term as used in the act of 1873, it is said:

"The words 'association of persons' are often, and not inaptly, employed to describe a corporation. An incorporated company is an association of individuals acting as a single person, and by their corporate name."

To briefly recapitulate, the act of 1873 authorizes only final or cash entries; it specifies the quantity of land which may be embraced, by legal subdivisions, in a given entry, the quantities varying according to the right conferred; and it limits the right to a single entry.

That the foregoing is a correct construction of the act of 1873 is clearly shown by the decisions of this Court.

In *United States v. Keitel*, 211 U. S. 370, this Court was required to construe the above statutes under an indictment charging the defendants with a conspiracy "to be effected by procuring various persons as agents to enter coal lands in their own name, ostensibly for their own benefit but in reality for the use and benefit of the accused and a named organization; the purchases being made by the agents as above stated, not with their own money, but with money of the accused or the corporation, and under agreements to convey the title, when acquired, to the accused or to the corporation, thus enabling the accused and the corporation to obtain coal lands belonging to the United States in excess of the quantity which they were allowed by law to enter." This Court in its opinion, after referring to §§ 2347 to 2352, inclusive, said:

"Under these sections the question is, Do they prohibit a person who is disqualified from acquiring additional coal lands from the United States, because he has already purchased the full quantity permitted by law, from employing one, who would be qualified if he made any entry of coal land, in his own behalf, to make such entry ostensibly for himself but really as agent for the disqualified principal to pay for the land with money of such principal under the obligation, when the title has been

obtained by purchasing from the United States, to turn over the land purchased to the concealed and disqualified principal?"

After thus stating the question to be determined, the Court proceeds:

"Beyond question, by §2347, Rev. Stat., everyone possessing the qualifications of age and citizenship therein stipulated is entitled, upon application and on payment of the price fixed by law, to purchase in his own behalf one hundred and sixty acres of coal land, and every association of persons possessing the qualifications therein mentioned is entitled to purchase three hundred and twenty acres of such land. This right, however, to thus purchase is not uncontrolled, since it is limited by the §2350, saying:

'The three preceding sections shall be held to authorize only one entry by the same person or association of persons; \* \* \*'

The express command that the preceding sections shall be held to authorize only one entry by the same person or association of persons causes the grant to purchase not to embrace more than one entry by the same person, and as the right to purchase the coal land did not exist except by the authority conferred by the statute, it follows that the express provision excluding the right to do a particular act is both, in form and substance, a prohibition against the doing of such act. \* \* \* True, the statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States to sell the same after he has become the owner of the land. The absence, however, of a limitation on the power to sell after acquisition affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. This clearly follows, since the right to sell that which one has lawfully acquired neither directly nor indirectly implies the authority to unlawfully acquire in violation of an express prohibition. \* \* \*

It is a misconception to assume that there is any real identity between a purchase made by a qualified person in his own name and for himself with a purchase made by such person ostensibly for himself but really as the agent of a disqualified person. In the one case the person securing coal land from the United States for himself is free to dispose of the land after acquisition as he may deem best for his interest and for the development of the property acquired. In the other case the ostensible purchaser acquires with no dominion or control over the property, with no power to deal with it free from the control of the disqualified person for whose benefit the purchase was made."

In *United States v. Forrester*, 211 U. S. 399, the Court was required to consider the question, under a similar indictment, whether persons in whose favor preference rights to enter coal lands had arisen might be employed by disqualified persons or associations to exercise such rights by purchasing the land ostensibly for themselves but in reality for the benefit of such disqualified persons or associations, and to pay for the same with money furnished by the principals under an obligation to convey the land to them.

In determining this question the Court, after reiterating the construction of the law announced in the Keitel case, said:

"The mere preference right obtained as the result of taking the steps enumerated in §§ 2348, 2349, Rev. Stat., including the filing of the declaratory statement, is, as described in §2348, simply 'a preference right of entry, under the preceding section, of the mine so opened and improved.' Turning to §2347, the preceding section referred to, it will be seen that the entry therein provided for is the cash entry made by applying to purchase the land, and co-temporaneously therewith making payment for

the same, which entry, as we have decided in the *Keitel case*, excludes the right of a qualified person to make the entry in his own name with the money and for the benefit of a disqualified person. When it is considered that the preference which the statute allows is but a right within the time limited in the statute to make the entry authorized by §2347, it cannot be held, without destroying that section, that the obtaining of such mere right of preference authorized the making, not only of an entry which the statute permitted, but as well one which the statute forbade. All the argument which seeks to demonstrate that the provision which gives the right to be preferred in making an authorized entry, endows with the authority to make an illegal because prohibited entry, rests upon a mere misconception of the nature and character of the right of preference for which the statute provides. The argument assumes that the right of preference is in and of itself the equivalent of an entry, not controlled by the prohibition which the statute expresses, when in truth and in fact the right of preference is merely a privilege given to make the statutory entry of a particular tract of coal land in preference to others. And the misconceptions upon which the argument rests concerning the nature and character of the preference right for which the coal land statutes provide when duly appreciated at once demonstrates the irrelevancy of previous rulings of this court concerning the right of an entryman after entry *or after the doing of acts made by the statute equivalent to an entry* to dispose of the land embraced within the entry." (Italics ours.)

#### THE ACT OF APRIL 28, 1904.

Having thus considered and ascertained the true meaning and interpretation of the general coal-land law let us now consider the provisions of the Act of 1904.



For the convenience of the Court, this act is here quoted in full:

“An Act to amend an Act entitled ‘An Act to extend the coal-land laws to the district of Alaska,’ approved June sixth, nineteen hundred.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment

of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

Sec. 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this Act shall continue and be in full force in the district of Alaska.

Approved April 28, 1904."

If we were to lay aside all reference to Revised Statutes §§ 2347 to 2352, little difficulty would arise in determining the true construction of this law or in ascertaining the nature and scope of the rights conferred. So considered, the law is complete in itself. It is plain and simple in its terms and needs not to be explained. In declaring the rights granted, the language of the act is:

“That any person or association of persons qualified to make entry \* \* \* who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts \* \* \*.”

This language is open to but one grammatical construction.

“A legislative act is to be interpreted according to the intention of the legislation apparent upon its face.”

*United States v. Fisher*, 109 U. S. 145.

“The primary and general rule of construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar.”

*United States v. Goldenberg*, 168 U. S. 102.

“Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.”

*Lake County v. Rollins*, 130 U. S. 670.

After thus declaring the right, the statute proceeds, in clear and explicit terms, to point out the method of procedure to initiate and vest the right and to carry the same to patent. In so doing the act follows in close analogy the various provisions of the general mining law.

Opinion of Attorney General, 39 L. D. 323.

The act, however, does contain references to the earlier law, and it is proper that these references should be now considered.

#### The Title of the Act.

The title of the act is as follows:

“An Act to amend an act entitled ‘An Act to extend the coal-land laws to the district of Alaska,’ approved June sixth, nineteen hundred.”

While the title thus purports that it is an act to amend an act of Congress extending Revised Statutes §§ 2347-2352, inclusive, to the district of Alaska, the body of the act relates to a classification of lands not covered by the earlier law or subject to entry thereunder, namely, unsurveyed coal lands. Its provisions are complete in themselves, and, as will hereafter be more fully shown, it confers new and different rights.

In the case of *Cornell v. Coyne*, 192 U. S. 430, Mr. Justice Brewer says:

“The title of an act is referred to only in cases of doubt or ambiguity.

“The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. *United States v. Fisher*, 2 Cranch. 358, 386; *Yazoo & Mississippi Railroad v. Thomas*, 132 U. S. 174, 188. The am-

biguity must be in the context and not in the title to render the latter of any avail.' *United States v. Oregon, etc., Railroad*, 164 U. S. 526, 541. See also *Price v. Forrest*, 173 U. S. 410, 427, and cases cited."

Even if the language of the act were ambiguous, the history of its enactment, hereinafter referred to, will indicate that little significance is to be attached to its title. But in any event it does not purport to amend R. S. §§ 2347 to 2352, but merely to amend the act of June 6, 1900, by adding a complete law relating to unsurveyed coal lands.

#### Section 4 of the Act.

Section 4 of the act provides:

"That all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska."

What is the significance of this provision? If it had been entirely omitted from the act, would not the Court be required to construe the law precisely the same? Logically there can be no escape from the conclusion that it amounts to no more than a statutory declaration of the common law rule of construction. It is a general rule of construction that where two statutes relate to the same or similar subjects, the later act will not be held to repeal the earlier by implication, unless there is a necessary repugnance between some or all of their provisions. Repeals by implication are never favored by the courts.

In *Frost v. Wenie*, 157 U. S. 58, the Supreme Court, by Justice Harlan, says:

"It is well settled that repeals by implication are not to be favored. And where two statutes cover,

in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both.”

*United States v. Healey*, 160 U. S. 146, 147.

*United States v. Matthews*, 173 U. S. 388.

In the latter case Mr. Justice Brown says:

“I had assumed it to be the law that a later act would not be held to qualify or repeal a prior one, unless there were a positive repugnancy between the provisions of the new law and the old, and even then the prior law is only repealed to the extent of such repugnancy.”

Properly construed, however, there is no conflict between the two laws. The act of 1904 relates to unsurveyed lands upon which qualified persons shall have opened or improved a coal mine or mines in the district of Alaska, and is alone applicable thereto. The act of June 6, 1900, relates solely to surveyed lands in the district of Alaska. As we have seen, Congress had already extended the United States surveys to the district of Alaska, and in expressly declaring its purpose not to repeal this law it simply meant to declare that whenever the executive department of the United States shall see fit to cause any portion of the public lands of the district of Alaska to be surveyed, in the progress of advancing civilization, coal lands embraced within such surveys can be entered only under the act of 1873.

#### **The Act Considered as Amendatory.**

Let us now, however, consider the act of 1904 on the hypothesis that it was intended by Congress as an amendment of the act of June 6, 1900, extending



Revised Statutes §§ 2347 to 2352, inclusive, to the district of Alaska, and that the two laws so far as not in conflict are to be considered as one body of law providing for the disposition of coal lands in that territory. So construed, the act of 1904 would constitute the later provision in a single body of laws. As a general rule courts in construing an amendment to a statute must consider the amendment as a part of the original act, and the entire act as amended must be given the same construction as if the amendment had been a part of the original law. The rule is thus stated in Endlich on the Interpretation of Statutes, section 294, as follows:

“A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matters superseded by the amendments eliminated.”

This rule has been approved by this Court in *Blair v. Chicago*, 201 U. S. 475.

In this view, Revised Statutes §§ 2347 to 2352 would appear first in the body of the law and would define the right and the method of procedure of qualified persons to make cash entry of surveyed coal lands of the United States; and the provisions of the act of 1904 would follow and define the right and method of procedure of qualified persons who have opened or improved coal mines to locate and acquire unsurveyed coal lands of the United States in the district of Alaska. So considered, R. S. §2350 would by its terms be confined to the three sections immediately preceding it; in other words, it would declare that

the sections of the law authorizing cash entry of surveyed lands "shall be held to authorize only one entry by the same person or association of persons." Upon what theory of statutory construction could the limitations of this section be held to apply to the subsequent provisions of the law granting a different right, providing a different method of procedure and relating to a different classification of lands, namely, unsurveyed coal lands in the district of Alaska?

It has been suggested that the original act of 1873 was differently phrased in its fourth section; but it was subsequently revised and codified by Congress as it appears in §§ 2347 to 2352 of the Revised Statutes, and it was in this form only that the law was extended to the district of Alaska.

In *Deffebach v. Hawke*, 115 U. S. 402, this Court, in considering a like question, said:

"The provisions of the act of 1872, with the exceptions made by the act of 1873, were carried into the Revised Statutes, which declare the statute law of the United States upon the subjects to which they relate, as it existed on the 1st of December, 1873. Rev. Stat. §2345. All other provisions contained in the acts, of which any portion is embraced in this revision, are in express language repealed. §5596. No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised Statutes, when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision."

Strictly speaking, therefore, the prohibition contained in R. S. §2350 cannot by any proper rule of statutory construction be held to apply to the provisions of the amendatory act of April 28, 1904.

## CONSTRUCTION OF THE ACT OF 1904.

Let us, however, for the purposes of argument, assume that all the provisions of the earlier law not in conflict with the provisions of the later law do apply to it and govern the rights to be acquired under it. Upon this premise we must now construe the terms of the later law. This involves a consideration of

- (a) *The nature of the right conferred;*
- (b) *The conditions upon which the right is granted;*
- (c) *The significance of the plural words of the act in defining the grant;*
- (d) *The meaning of the words "mine or mines;"*
- (e) *And, finally, the conflicts between the two laws.*

**(a) The Nature of the Right Conferred.**

This act confers upon qualified persons and associations of qualified persons who shall have opened or improved a coal mine or mines the right, not to make cash entry, as in the general coal-land laws, but to locate the lands on which the mines are situated in rectangular tracts. This is required to be done, as in the mining law, by establishing monuments at the four corners and by filing for record in the recording district a notice of location, and also by filing the same with the register and receiver of the land district. By these acts the land is segregated from the public domain and appropriated by the locator.

It is to be observed that the words "enter" and "entry" are nowhere used in the act except in adopting the qualifications specified in R. S. §2347.

These words have a fixed and definite meaning in the public land laws, a meaning which varies, however, according to the language of the act. In some cases, as in the general coal-land laws, they refer to the final act of purchase and payment. In some cases they are held to refer to the entire proceedings from the initiatory to the final acts consummating title in the entryman.

In other cases the term "entry" is held to mean that act by which an individual acquires an inceptive right to a portion of the unappropriated soil by filing his claim with the proper officer, as in settlement under the pre-emption law, locations under the mining law, or in applications to purchase under the timber and stone and the timber culture acts.

*Chotard v. Pope*, 12 Wheat. 586.

*Adams v. Church*, 193 U. S. 510.

*Williamson v. United States*, 207 U. S. 460.

*United States v. Biggs*, 211 U. S. 520.

It is held both under the timber culture act and the timber and stone act, neither of which expressly gives a right of assignment, that the filing of the application is an entry and after application and before final or cash entry the entryman may lawfully contract to sell; and that the Department of the Interior cannot by its rules and regulations lawfully prohibit the exercise of such right.

*Adams v. Church*, 193 U. S. 510.

*Williamson v. United States*, 207 U. S. 460.

*United States v. Biggs*, 211 U. S. 520.

Under the mining law the word "location" is used instead of "entry," and this term has been uniformly employed by the courts in cases arising thereunder.

It has likewise been uniformly held by this Court that when a mining claim is perfected under the law the land is segregated from the public domain, becomes private property and as such may be aliened or encumbered and is subject to the laws of taxation and of inheritance.

*Forbes v. Gracey*, 94 U. S. 762.

*Belk v. Meagher*, 104 U. S. 279.

*Noyes v. Mantle*, 127 U. S. 348.

*Manuel v. Wulff*, 152 U. S. 511.

*Black v. Elkhorn M. Co.*, 163 U. S. 449.

*McKinley, etc., v. Alaska, etc.*, 183 U. S. 572.

*Clipper v. Eli, etc.*, 194 U. S. 226.

The mining law by its terms recognizes the right of assignment. It is also to be observed that by the second section of the act of 1904 the right of the locator to assign his interest is expressly recognized, and that either he or his assignee by complying with the requirements in this section enumerated can obtain patent to the lands embraced in the location upon payment of the nominal sum of ten dollars per acre, if a citizen of the United States.

It thus appears that the act of location constitutes an entry and initiates and vests in the locator a qualified or limited estate in the lands embraced therein. This is further made apparent by the provisions of section 3 of the act, which section provides that an "adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such

court therein." As the action to quiet title must be brought in a court of competent jurisdiction within the district of Alaska, Congress, in defining the nature of the action, evidently had reference to section 475 of the Political Code of Alaska, enacted on June 6, 1900, which section reads as follows:

"Suit to determine adverse claims. Any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims *an estate or interest therein* adverse to him, for the purpose of determining such claim, estate, or interest." (Italics ours.)

**(b) Conditions Upon Which the Right Is Granted.**

We have already seen that by the earlier law the right was conferred upon every qualified person to make one cash entry, by legal subdivisions, of vacant coal lands of the United States, limited in quantity to one hundred and sixty acres. The act of 1904 imposed a further condition to the exercise of the right. In addition to qualification, it requires, as a condition precedent to the exercise of the right of location, that the locator shall have opened or improved a coal mine on the unsurveyed public lands of the United States in the district of Alaska. This condition implies exploration and discovery. It imposes the burden of labor and expense as a prerequisite to the exercise and enjoyment of the right. But when he has complied with this condition and located the mine he acquires an estate in the property, as we have seen, which may be perfected and carried to patent upon the payment of the nominal sum of ten dollars per acre.

**(c) Significance of the Plural Words of the Act.**

The grant of the right is found in the first section of the act. In defining this right Congress saw



fit to declare that "any person or association of persons qualified, etc., who shall have opened or improved a coal mine or coal *mines* \* \* \* may locate the lands on which such mine or *mines* are situated in rectangular *tracts*." The plural terms above quoted must, in construing the law, be given their usual significance, their ordinary grammatical sense. Unless Congress intended that either the individual or the association of qualified persons might exercise more than one right of location, the use of the words "mines," "lands" and "tracts" in the plural would have been meaningless. If it had intended that in no case there should be more than a single exercise of the right, it would have declared "that any person who, or association which, shall have opened or improved a coal mine may locate the land upon which such mine is situated in a rectangular tract, etc." It would also have declared that such locator, instead of "such locators," shall file a notice of location; and it would have omitted in the second section the words "or locators." In construing an act of Congress, not only are the rules of grammar to be observed, so far as consistent with the sense of the law, but every word or term used is to be considered and to be given its usual and ordinary meaning.

**(d) Meaning of the Words "Mine or Mines."**

In what sense did Congress use the term "opened or improved a coal mine or coal mines?" This is to be determined by ascertaining the sense in which it used the word "mine." If, as has been asserted, by the term "opened or improved a mine" Congress meant to require such acts as constitute steps in the development of a commercial mine, *i. e.*, the opening of working shafts or tunnels from which coal was

to be mined for purposes of commerce, or the erection of bunkers and tipples, then it might be contended that the acts were to be confined to a single tract. To adopt such a construction, however, would be to convict Congress of an absurdity and to presuppose that it did not understand the conditions which the act was designed to relieve.

Moreover, upon such a construction, the words "or mines" would be a mere redundancy, since the opening of one mine on a given tract would be a compliance with the conditions precedent to the exercise of the right, and the opening of further mines, gratuitous and unnecessary.

We contend, however, that Congress in using the term "mine" meant a tract of land containing a coal-bed or coal deposit, *i. e.*, a potential mine; and that it intended to impose upon the locator the burden of exploration and discovery. This, we think, is made clear by the earlier coal-land laws and by other congressional legislation in which the term "mine" is used.

R. S. §441 declares that "the Secretary of the Interior is charged with the supervision of public business relating to the following subjects: \* \* \* Second, The public lands, including *mines*." As Congress had not at the time of passing this law (or since) adopted the policy of opening and operating mines commercially, the word must have been here used in the sense of mineral deposits or potential mines.

There was exempted from the operation of the pre-emption law—"Fourth: Lands on which are situated known *salines* or *mines*" (R. S. §2258). As we have heretofore seen, in the first coal-land act

(Act of July 1, 1864) the following language is employed: "That where any tracts embracing *coal-beds* or *coal-fields*, constituting portions of the public domain, and which as *mines* are excluded from the pre-emption act of eighteen hundred and forty-one, etc."—thus defining coal-beds or coal-fields as mines. See *Mullan v. United States*, 118 U. S. 277.

In the second section of the act of 1873 (R. S. §2348) it is declared that any person or association of persons severally qualified, who have opened and improved any coal mine or mines upon the public lands "shall be entitled to a preference right of entry, under the preceding section, of the *mines* so opened and improved;" thus giving the right of entry of *mines* by tracts as defined in the first section of the act.

Again, in the general mining law, the term is used by Congress in the same sense, as in R. S. §2323, where the following language occurs: "Where a tunnel is run for the development of a vein or lode or for the discovery of *mines*."

It thus becomes apparent that Congress meant in the act of 1904 to reward those qualified persons who explored the unsurveyed public domain in the district of Alaska by permitting the "location" of coal mines discovered by them. In this view only can the use of the words, "mine or mines," be given any real significance in the act; and in this view Congress necessarily intended that more than one mine might be located, at least by an association of qualified persons.

#### (e) Conflicts Between the Two Laws.

From an analysis of the two laws it becomes apparent that the provisions of the later law are in

conflict with the provisions of the earlier law in the following particulars:

*First: In the conditions precedent to the exercise or enjoyment of the right;*

*Second: In the nature of the right conferred;*

*Third: In granting to the locator the right of assignment;*

*Fourth: In requiring full citizenship as a condition of the right to receive patent;*

*Fifth: In the various statutory proceedings for the exercise of the right from the initiation to the final consummation thereof; and*

*Sixth: In fixing a flat price of ten dollars per acre to be paid to the Government.*

In what respect, therefore, does the earlier law stand without essential conflict with the later law so that its provisions may operate upon or govern rights to be acquired under and in pursuance of the later act? If these laws are to be construed according to the usual canons of construction, we think the answer must be, none. But if the rule announced in *Deffebach v. Hawke* (*supra*) be disregarded, and a liberal construction be adopted, may it be held that the *limitations and restrictions* of the earlier law are not in conflict with the provisions of the later law, and hence that they may govern or control rights acquired under it? The determination of this question requires an analysis of certain of the provisions of these laws.

As we have seen, by R. S. §2347 there was granted to every qualified person the right to make an entry of coal lands, which entry was limited in quantity to one hundred and sixty acres; and there was like-

wise granted to any association of qualified persons the right to make an entry limited in quantity to three hundred and twenty acres. And by R. S. §2350 it was provided that the three preceding sections shall be held to authorize only one entry by the same person or association of persons. Thus, by the first section of the act, the right of entry is granted and the quantity to be embraced in an entry is limited, and by the fourth section the exercise of the right is restricted to one entry.

Turning now to the act of 1904, the right, as we have seen, is granted in the following terms:

"That any person or association of persons qualified to make entry \* \* \*, who shall have opened or improved a coal *mine* or coal *mines* on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the *lands* upon which such mine or mines are situated in rectangular *tracts* containing forty, eighty or one hundred and sixty acres, with north and south boundary lines \* \* \*."

Do the terms of this grant conflict with the limitations and restrictions of the earlier law? If the terms employed by Congress are construed according to their ordinary and usual signification, a conflict necessarily follows, and the provisions of the later law must prevail.

Speaking first as to the individual as distinguished from an association of qualified persons, it must be conceded that the right is here clearly granted to every qualified person who shall have opened or improved a coal mine to locate the land embracing it in a tract containing forty, eighty or one hundred and sixty acres. If this right is limited as to quantity, it must be solely because the maximum area of any tract to be embraced in a location is defined in the

act as one hundred and sixty acres. It should be observed, however, that the designated size and shape of the tracts was evidently inserted in the act with a view of conforming, so far as practicable, to the system of public land surveys; and it is to be noted that there is no express limitation of quantity as in the earlier law.

On the other hand, if the prohibition of R. S. §2350 applies so as to restrict the individual to one location, it must be because the words "mine or mines," "lands" and "tracts" in the above grant must be taken distributively, *reddendo singula singulis*. In other words, such a construction can be consistent with the act only on the theory that its first section is to be read as follows:

"Any person \* \* qualified to make entry \* \*, who shall have opened or improved a coal mine \* \*, may locate the land on which such mine is situated in a rectangular tract containing forty, eighty or one hundred and sixty acres, etc.; and any association of persons qualified to make entry \* \*, who shall have opened or improved coal mines \* \*, may locate the lands on which such mines are situated in rectangular tracts, etc."

But upon no construction consistent with the language employed by Congress can qualified persons who have associated themselves together in opening or improving coal mines in the district of Alaska be limited in the right to locate the tracts containing such mines, *i. e.*, coal-beds or deposits, so long as the number of tracts so located does not exceed the number of qualified persons so associating themselves together; and it will be observed that in the case at bar each qualified person made but one location.

It would be unreasonable to assume that Congress,



having previously granted to an association the right to make cash entry of three hundred and twenty or six hundred and forty acres of surveyed land, intended to limit the right of qualified persons who had associated themselves together to a single location of a tract containing forty, eighty or one hundred and sixty acres of unsurveyed lands in the district of Alaska, where it imposed as a condition of the exercise of the right that they should first open or improve mines and thereafter bear the expense of locating and surveying them. If such had been the intention of Congress, it would have been easy to make its purpose clear. The language it did employ is inconsistent with the purpose on the part of Congress to thus restrict the right of location in the case of an association of qualified persons. Congress intended to grant relief adequate to meet the conditions then known to exist in Alaska. The law was passed for the benefit of prospectors who were known to have already explored and discovered deposits of coal. It was understood by Congress that the conditions imposed by Nature rendered it hazardous, if not impossible, for individuals to explore and locate coal mines in Alaska singly. There existed no adequate reason, in the exercise of a sound public policy, in enacting the law of 1904, why Congress should impose any restriction upon the right of men to associate themselves together, by denying to each, in case of such association, the full measure of his individual right. The express terms of the act plainly indicate that Congress did not intend to place any burden on the right of qualified persons who associated themselves together in the difficult task of invading the icebound and mountainous barriers of Alaska and of discovering, *i. e.*, opening

or improving coal mines therein, by limiting the quantity of lands they might thus acquire to a less amount than one full location to each qualified person.

In any other view the words "association of persons qualified to make entry, *who* shall have opened or improved coal mines on any of the unsurveyed public lands \* \* \* in the district of Alaska, may locate the lands upon which such mines are situated in tracts" would not have grammatical sense, or be given their ordinary and usual significance.

#### PUBLIC POLICY.

Since the restriction as to the right of entry and the limitations as to the quantity of land that may be entered by an association, contained in the act of 1873, cannot by any recognized principles of statutory construction be expressly incorporated in or imposed upon the act of 1904 so as to restrict the right of location of any association of qualified persons or to limit the quantity of land that may be located by them, the contention of the Government must be made to rest upon the assumption that Congress has by the earlier law declared the policy of the Government in this particular. There can, however, be no sound reason urged for assuming that the limitations as to the quantity of land which might be entered by an association under the act of 1873 was declaratory of a settled policy of Congress applicable to the disposition of coal lands in the unexplored and unsurveyed territory of Alaska.

Moreover, we think it clear that when, in the new law, it abandoned the provision for cash purchase and entry at the full value of the land as fixed by the Interior Department, and substituted therefor discovery and location with the payment of a nomi-

nal price per acre, as in the mining law, Congress abandoned the essential policy of the earlier law.

On July 18, 1904, the Department of the Interior issued instructions under the act of April 28, 1904, which contained no express intimation that the limitations and restrictions of the earlier law applied to it. (33 L. D. 114.)

On April 12, 1907, the department promulgated rules and regulations under this act, in which it was for the first time declared that an "entry by an association of persons may embrace 320 acres"; and that "when an association of not less than four persons \* \* \* shall have expended not less than \$5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres \* \* \*." (35 L. D. 675.)

By its latest construction of the law it has held, in the Cunningham case, that an entry by an association may embrace not more than one hundred and sixty acres. (See Appendix D, Brief for U. S., p. 56.)

Thus all attempts of the Interior Department to apply the public policy declared in the earlier law to the construction of the act in question have resulted only in confusion.

So, also, if the policy of Congress is to be ascertained by recourse to other laws *in pari materia*, we are left in a bewilderment of doubt. In 1892 Congress passed an act authorizing the entry of lands chiefly valuable for building stone under the placer mining laws (27 Stat. 347), whereunder associations might make plural entries in tracts of twenty acres each. And in 1897 Congress passed an act authorizing the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws (29 Stat. 526).

Words, however, cannot be engrafted upon one statute or provision of the law merely by reference to a public policy assumed to be declared by another statute, even though relating to the same general subject; and particularly where they relate to different classifications of that subject and provide different methods of procedure. As is said by Mr. Justice Field:

“What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.”

*Hadden v. The Collector*, 5 Wall. 107.

See also:

*Bates Refrigerating Co. v. Sulzberger*, 157 U. S. 37.

*Dewey v. United States*, 178 U. S. 521.

In the latter case it is said by Mr. Justice Harlan:

“Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here, the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed.”

Where a provision is left out of the statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate, and not to construe.

*Hobbs v. McLean*, 117 U. S. 567.

*State v. Simon*, 26 Pac. 171 (Ore.) Bean, J.

Justice Story, in *United States v. Coombs*, 12 Peters, 80, says:

"There is, then, no reason, founded in the language or policy of the clause, to insert a restriction and locality which have not been expressed by the legislature. On the contrary, upon general principles of interpretation, where the words are general, the courts are not at liberty to insert limitations not called for by the sense, or the objects, or the mischiefs of the enactment."

In *Adams v. Church* (*supra*) the Supreme Court, after construing the rights of an applicant under the Timber Culture Act and the effect of regulations of the Interior Department, said:

"Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law."

With equal propriety it may be here said that had Congress intended when it enacted the law of 1904 to limit the right of qualified persons to associate themselves together in making, or in contracting to assign, locations of unsurveyed coal lands in the district of Alaska, "it would have so declared in the law." Was it left out in words, to be put back by construction? As is said in *Pirie v. Chicago Title and Trust Co.*, 182 U. S. 448:

"There is a presumption against it. When the purpose of a prior law is continued usually its words

are, and an omission of the words implied an omission of the purpose."

#### HISTORY OF THE ENACTMENT OF THE LAW.

It is a recognized rule that when the language of an act is ambiguous the courts may have recourse to the history of the enactment in order to ascertain the legislative intent. While we insist that no ambiguity exists in the law in question which requires the application of this rule of construction, we think that if the history of its enactment be examined, it will sustain the views heretofore expressed.

At the second session of the 57th Congress a bill was introduced by Mr. Lacey in the lower house, which read as follows:

"That any person or association of persons, qualified to make entry under the coal-land laws of the United States, who shall have opened *and* improved a coal mine, or coal mines, on the unsurveyed public lands in the district of Alaska, and who may desire to enter and purchase the same, *according to the provisions of the said coal-land laws*, before the extension of the public-land surveys over the lands on which such mines are located, shall file in the proper land office an application to enter the lands held and claimed by them, together with a plat and field notes of a survey of the same made under the direction of the surveyor-general of the district of Alaska, showing the boundaries of said tracts and their location as regards permanent natural land-marks or other surveys. All tracts shall be rectangular in form, containing forty, eighty, or one hundred and sixty acres, and distinctly marked by monuments on the ground, and the boundaries of the same shall be true east and west and north and south lines as nearly as practicable. Upon presentation of said plat and field notes the application, if otherwise regular, shall be accepted as though the tract sought to be entered



were embraced within the regular public-land surveys.

Sec. 2. That the Secretary of the Interior shall make all necessary rules and regulations for the purpose of carrying into effect the provisions of this act." (*Italics ours.*)

This bill was again introduced by Mr. Lacey in the second session of the 58th Congress as a substitute for H. R. 8869.

Senators Burnham and Nelson, members of the committee on public lands of the Senate, visited Alaska in the summer of 1903 as members of a committee of the Senate. Relying on the information as to local conditions and needs obtained by them, they prepared a bill which was introduced by Mr. Burnham in the second session of the 58th Congress on December 18, 1903, and referred to the committee on public lands. This bill adopted the first and second sections of the Lacey bill as its first and sixth sections. The remainder of the bill was as follows:

"Sec. 2. That six months' preference right shall be allowed to the actual settler or claimant who has located or staked coal lands, either by himself or agent at the date of the passage of this act, to file his declaratory statement and enter said lands.

Sec. 3. That five years from and after the expiration of the period allowed for filing the declaratory statement and making entry is allowed claimant in which to make proof and payment for said lands, provided the claimant shall cause to be performed at least one hundred dollars' worth of labor or improvements during each of said years upon such claim.

Sec. 4. That upon filing of the declaratory statement and application to enter lands, together with the plat and field notes of the same, under the provisions of this act, the register and receiver of the

land office shall issue to claimant a certificate setting forth the facts of said entry, and of the right of claimant to purchase the same; and thereafter the claimant will be entitled to sell and transfer his right to purchase said land, and the purchaser be entitled to make due proof and payment therefor under the provisions of this act in the same manner as the original claimant; and nothing in this act shall prevent a bona fide purchaser for value from making proof and payment for more than one claim so purchased, provided the original claimant was qualified under the law to enter and purchase coal lands.

Sec. 5. That the price to be paid to the receiver for said coal lands taken under this act shall not be less than five dollars per acre."

This bill appears to have been submitted to the Secretary of the Interior for his recommendations.

Subsequently a bill was introduced by Senator Heyburn authorizing the location of coal claims upon unsurveyed public lands in the district of Alaska, which bill was referred to the committee on mines of the Senate and by that committee reported back without amendment. (See Appendix A.) Both bills appear to have come into the hands of the Commissioner of the General Land Office, who made a report to the Secretary of the Interior criticizing certain provisions of the Burnham bill, and recommending as a substitute a bill embodying the language and provisions of the Heyburn bill with no important changes, except that it added at the end of the fourth section the words, "and no coal shall be mined for sale outside of said district until a patent shall have issued for the land from which it is mined." This report was transmitted by the Secretary of the Interior to the Senate committee on public lands; and this committee reported back

to the Senate the Heyburn bill as a substitute, with the recommendation that it be passed. In its report the committee says:

"The proposed amendment is in accordance with the recommendation of the Commissioner of the General Land Office, the only change made being in the last section, namely, in the omission of the words 'and no coal shall be mined for sale outside of said district until a patent shall have issued for the land from which it is mined.' The committee do not deem it wise to place this restriction upon the disposal of coal mined in Alaska before issuance of patent.

There is a pressing need of legislation of the kind suggested in the proposed bill. As the laws now stand claimants cannot secure title to coal lands in Alaska. The measure was referred to the Commissioner of the General Land Office, and appended herewith is a copy of his report upon the same."

The amended bill as thus recommended by the Senate committee on public lands, with unimportant clerical changes, was passed by both houses of Congress and became law on April 28, 1904.

From this review of the congressional history of the enactment it becomes apparent that Congress, after due consideration, declined to pass the Lacey bill, under which the unsurveyed coal lands in the district of Alaska would have been subject to entry and purchase "according to the provisions of the said coal-land laws (R. S. §§ 2347 to 2352)." It also declined to pass the Burnham bill, under which qualified persons might have been denied the full measure of their individual rights in case they formed an association among themselves to jointly carry on the work of exploration and of opening or improving the coal-beds or mines discovered, while the right was conferred upon associations or corporations, as

well as individuals, to purchase an unlimited number of claims and carry them to patent. Instead, Congress passed the Heyburn bill, under which every qualified person who complied with its conditions might enjoy the full measure of the right conferred without any limitation of such right because of associating himself with other qualified persons in the performance of the pre-requisite conditions; and under which the right of assignment was also preserved.

ACT OF MAY 28, 1908.

It has been urged that the act of Congress of May 28, 1908, (35 Stat. 424) should be referred to for the purpose of ascertaining the legislative intent in the act of 1904, and that when so considered it must be deemed inconsistent with the construction heretofore urged. It is true that when the language of a law is ambiguous, courts will sometime have recourse to a later act *in pari materia*, passed by the same legislative body, for the purpose of determining the meaning which that body intended to give to the earlier law. This rule, however, should have no application in this case, for the following reasons: First, because the language of the act of 1904 involves no such ambiguity as to permit the application of the rule; and second, because all rights initiated and vested under the act of 1904 existed at the time of the passage of the act of 1908,—all coal lands not then located having been withdrawn from entry by executive order—and it would not be competent for Congress to restrict rights vested under a prior law.

The act of 1908, when properly construed, however, in nowise conflicts with the views herein presented or with the construction given to the act of 1904 by the trial court.

For the convenience of this Court we quote so much of the act of 1908 as is here pertinent.

"An Act to encourage the development of coal deposits in the Territory of Alaska.

Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled, That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by *including in a single claim, location, or purchase* not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs or assigns may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: *Provided*, That no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska." (*Italics ours.*)

This law, as its title indicates, was passed to encourage the *development* of coal deposits in the territory of Alaska. It relates solely to locations already made under the existing law, which was passed in the light of the well known fact that qualified persons, by themselves or their agents, had co-operated in the exploration of the territory and in the discovery and opening of deposits of coal. These men, for the most part, possessed limited means and they were unable by themselves to develop the coal

deposits embraced in their locations. They could not part with any interest in their claims except to citizens of the United States or to associations or corporations composed of citizens. To comply with the provisions of the act under which their locations were made, it was necessary that each location should be separately surveyed, a very difficult and expensive task; and it was also necessary that a separate application should be made, a separate notice published, and separate proof furnished, in procuring patent to each claim. By the law of 1908 the locators were relieved of a portion of these burdens. They were permitted, by forming associations or corporations, to combine sixteen locations into one claim, one survey of the whole, one application for patent, and one publication of notice. They were allowed to offer their proofs in one proceeding and pay one set of fees, instead of sixteen. This involved a saving of many thousands of dollars in the case of each such association. Moreover, the restriction of the act of 1904, that the assignees must be citizens of the United States, was in part removed, in that the holders of twenty-five per cent. of the stock might be aliens.

The very fact that Congress by this law recognized the right of associations or corporations regularly formed to perfect an entry embracing sixteen locations clearly indicates that it had not intended by its earlier law to limit the right of qualified persons, who associated themselves together in their efforts to explore and to open and improve coal beds or deposits, to a single location of one hundred and sixty acres of land, as now held by the Interior Department, or to adhere to the policy declared in the act of 1873.



## DID THE COURT COMMIT REVERSIBLE ERROR?

If the views above expressed are correct, then the trial court was right in the general scope of its opinion respecting the true construction of the coal-land laws applicable to unsurveyed lands in the District of Alaska, at least so far as affects the facts charged in this indictment. But if its construction be not affirmed in its entirety, nevertheless, the judgment of the trial court cannot be reversed.

As we have heretofore seen, jurisdiction is not conferred upon this Court by the act of March 2, 1907, to review the construction given by the trial court to the indictment. Its power to review is limited to the construction given by the trial court to "the statute upon which the indictment is founded." Even if this Court should not affirm that construction in its entirety, nevertheless, if upon a true construction of the statute when applied to the indictment as construed by the trial court there was no error committed in quashing the indictment, then no reversal can follow.

It will be remembered that the trial court held that the lands located were subject to the operation of the law; that the locators were qualified persons who each made but one location; and that in making their locations they acted for themselves and not as the agents or dummies of the defendants or of the corporations named in the indictment. It becomes necessary, therefore, to determine whether an alleged conspiracy whose objects and purposes were to be effected by acquiring coal claims from qualified persons who made valid locations in their own interests is prohibited by the coal-land laws applicable, and is therefore a fraud upon the Government.

This question involves the construction of the second section of the act of 1904. By this section the right of the locator to assign his claim is expressly recognized. As we have seen, the location when legally perfected creates an inchoate estate in the locator. Nothing remains to be done by him in order to obtain his patent except to make application therefor, accompanied by a certified copy of the survey and field notes of the claim, to cause the prescribed notice and proofs to be given and furnished, and to pay the flat sum of ten dollars per acre for the lands applied for. And this may be done by his assignees who are citizens of the United States. It follows, therefore, that the statute must be construed to have conferred upon the locator the right of alienation, restricted only by the limitation that the alienee must be a citizen of the United States.

Upon this subject the trial court in its written opinion appropriately said:

"By the law of 1873 a person twenty-one years of age and a citizen of the United States is qualified to make an entry of coal land, and having the same qualifications and having, also, *opened or improved a coal mine on unsurveyed public land in Alaska*, he is entitled to become a locator of a coal claim including the mine which he has opened or improved. This is so according to the letter of the law. And having located a coal claim, he may sell it and his vendee, if a citizen of the United States or an association composed of citizens, is entitled to receive a patent conveying the complete title from the Government by compliance with the requirement of section 10052 [Sec. 2, Act 1904]. To say that a vendee of a qualified locator to be entitled to receive a patent must be a citizen or association of citizens qualified as prescribed, to make an entry of coal land, *and not disqualified by having exercised a right to acquire coal*

land from the Government, infringes legislative power, for in the guise of construction, a radical change in the law would be effected by the addition of requirements and restrictions which the law-making power did not put there. The words of the law are: "That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, \* \* \*." By having made *citizenship* a requisite condition of the right to receive a patent, the law makes *citizenship* the only requisite condition to the right. This is so by the rule declared by the Supreme Court in the words of Mr. Justice Davis above quoted, which is a fundamental rule for the construction and interpretation of statutes. *Expressum facit cessare tacitum.*"

In determining the legal significance of this right of alienation we may be assisted by some review of the decisions of the courts upon this subject.

In the case of *Myers v. Croft*, 13 Wall. 296, the Court had under consideration the legal effect of the proviso contained in the Pre-emption Act that "all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void." Upon this question the Court said:

"Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and *independently of the legislation of Congress assignable.*" (Italics ours.)

Thus the Court, following the rule laid down in *Thredgill v. Pintard*, 12 Howard, 24, recognizes and affirms the doctrine that a valuable right conferred by act of Congress is property, and therefore assignable, unless restricted by the act.

Later the courts were required to determine the question of the assignability of the Soldiers' and Sailors' Additional Homestead Rights. In considering this question Mr. Justice Brewer, in the case of *Mullen v. Wine*, 26 Fed. 206, said:

"Congress has placed no restriction,—who may?"

Subsequently this question came before the Supreme Court of the United States in *Webster v. Luther*, 163 U. S. 331. In this case the Court was required to construe the above law (R. S. §2306), which reads as follows:

"Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

This section was enacted on March 3, 1873, (17 Stat. 605), as an amendment to the Soldiers' and Sailors' Homestead Act of 1862. The question involved was the power of the beneficiaries to assign additional homestead rights before entry. Mr. Justice Harlan, in holding that this right was not burdened by the prohibition against alienation contained in the homestead law, quoted with approval from the decision of Judge Sanborn in the case of *Barnes v. Poirier*, 64 Fed. 14;

"The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. \* \* \* It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. \* \* \* Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint."

In the case of *Barnes v. Poirier* (*supra*) Judge Sanborn further said:

"Restraints upon alienation are not favored by the law. The modern rule is that one may do what he will with his own, unless prohibited by a positive statute, or restrained by a manifest public policy. It goes without saying that the assignment of this right before entry must be sustained unless it is thus clearly prohibited. The right of entry carries with it the right of immediate sale and disposition in the absence of such a prohibition."

In *Adams v. Church* (*supra*) the Court had under consideration the Timber Culture Act (20 Stat. 113). Section 2 of that act requires a person applying for the benefit of the law to make affidavit that he is the head of a family or over twenty-one years of age, and a citizen of the United States or has declared his intention to become such, "and that the application is made in good faith and not for the purpose of speculation or directly or indirectly for the use or benefit of any other person or persons whomsoever." Eight years must elapse from the date of application or original entry before final proof and the issuance of patent. The statute defines what the final proof

shall include and does not expressly cover the condition above quoted. In construing this law the Court said:

“If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. *Myers v. Croft*, 13 Wall. 291.

To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.”

Under the Timber and Stone Act the same question was presented to the Supreme Court in *Williamson v. United States*, 207 U. S. 425. In this case the defendants were under an indictment for conspiracy to suborn various entrymen to commit perjury in relation to declarations to be made under the Timber and Stone Act as to the purpose for which they desired to acquire the land, etc. It appeared in evidence that the entrymen had, between the times of filing their original applications to purchase and of making their final proofs, agreed to sell the land to the defendants. The Supreme Court held, on review, that as the act contained no prohibition against alienation *after* the original declaration and *before* final proof, the entrymen were free to sell, notwithstanding the rule of the General Land Office to the



contrary, with respect to final proof of the *bona fides* of the applicants, Mr. Justice White remarking, in the course of the opinion (p. 460),

“Indeed, we cannot perceive how, under the statute, if an applicant has in good faith complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right. These conclusions are directly sustained by a recent ruling in *Adams v. Church*, 193 U. S. 510, construing the timber culture act.”

This doctrine was re-affirmed in the case of *United States v. Biggs*, 211 U. S. 507.

In the earlier case of *United States v. Budd*, 144 U. S. 154, also arising under the Timber and Stone Act, Mr. Justice Brewer said:

“It appears that Montgomery purchased quite a number of tracts of timber lands in that vicinity, some ten thousand acres, as claimed by one of the witnesses; that the title to twenty-one of these tracts was obtained from the government within a year, by various parties, but with the same two witnesses to the application in each case; that the purchases by Montgomery were made shortly after the payment to the government, and in two instances a day or so before such payment; that these various deeds recite only a nominal consideration of one dollar; that Budd and Montgomery were residents of the same city, Portland, Oregon; that one of the two witnesses to these applications was examining the lands in that vicinity and reporting to Montgomery; and that the patentee, Budd, years after his conveyance to Montgomery, stated to a government agent who was making inquiry into the transaction that he still held the land and had not sold it, but that it was ‘in soak.’ But surely this amounts to little or nothing. It simply shows that Montgomery wanted

to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate, and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law.”

See also,

*St. Louis S. & R. Co. v. Kemp*, 10 U. S. 636.

*Telferner v. Russ*, 145 U. S. 522.

*Beley v. Naphtaly*, 169 U. S. 353.

*St. Louis M. & M. Co. v. Montana M. Co.*, 171 U. S. 651.

*Bradford v. Morrison*, 212 U. S. 389.

*United States v. Hammers*, 31 U. S. Sup. Ct. Rep. 593.

It thus appears from the authorities that the favored right of unrestricted alienation has been uniformly recognized by the Federal Courts under simi-

lar acts of Congress in the absence of any express prohibition.

Under R. S. §§ 2347 to 2352 there could be no assignment of the right before the entry was consummated, since the only entry authorized under this law was the final or cash entry and R. S. §2350 expressly restricted the right to make such entry to a single exercise thereof by the qualified person. Any attempt of such qualified person to assign the mere right would necessarily be prohibited by the law unless made to one who possessed the requisite qualifications and had never exercised the right; and in such case the assignment would convey nothing that the assignee did not already possess. It is manifest, therefore, that the restrictions of the earlier law cannot affect the right of assignment expressly given by the later law.

When the language of two statutes relating to kindred subjects and having similar objects is not alike and the state of facts to which they apply is different, each must be construed according to its own terms.

*French v. Spencer*, 21 Howard, 228.

*Maxwell v. Moore*, 22 Howard, 185.

In the latter case the Court was construing two acts of Congress, passed at different times and relating to the same general subject. The Act of 1812 granted to soldiers a bounty of lands in the Territory of Arkansas, but forbade alienation before the issuance of patents (2 St. at L. 672, 723). A portion of the lands subject to the terms of this act having been found unfit for agriculture, the Act of 1826 was passed by Congress (4 St. at L. 190). This act gave to soldiers, or their heirs, who removed to Arkansas

and to whom bounty lands had been patented which were subsequently found unfit for cultivation, the right to surrender their titles and to select and receive patents for other public lands in lieu thereof. The latter act contained no restriction upon alienation before the issuance of patent. In construing this law the Court held that the right to patent under it was not affected by the restriction contained in the earlier act, saying:

"It is insisted that the acts of 1812 and 1826 are on the same subject, must stand together as one provision, and the last act carry with it the prohibition found in the first. We are of the opinion that the acts have no necessary connection; \* \* \* In such cases the rule is that where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so."

In *French v. Spencer* (*supra*) the Court was considering the Bounty Land Act of 1816. It was contended by counsel that inasmuch as the Bounty Land Act of 1812 contained a prohibition against assignment before patent, that the *two* acts should be construed *in pari materia*, and that the prohibition against alienation was, therefore, a part of the Act of 1816. Mr. Justice Catron, speaking for the Court, said (p. 238):

"The Act of March 5, 1816, has no reference to, or necessary connection with, any other bounty land act; it is plain on its face, and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on part of the judicial tribunals legislative power. It is, that where the Legislature makes a plain provision, without making any exception, the courts can make none."

In the light of the express provisions of section 2

of the act of 1904 and of the right of alienation uniformly recognized by the decisions of this Court when not expressly prohibited by the statute, it must follow that the trial court committed no reversible error in the construction given by it to the statute upon which the indictment rests.

So also if the Court had construed the indictment to charge the defendants with having conspired to induce qualified persons to thereafter make locations, the result must be the same, since the Court expressly holds, under the averments of the indictment, that the locators acted for themselves and not as dummies or agents of the defendants or the corporations named. As the owners of their respective claims, the locators might lawfully agree to sell or to convey them after location or after patent. What it is lawful to do, it is lawful to agree to do. In the absence of any express restriction in the statute, an agreement made in advance to sell after location or to convey after patent, when the locator acts for himself and receives the whole benefit, cannot be a violation of the law, and is, therefore, not a fraud upon the Government.

#### STATUTORY CONSTRUCTION IN PENAL CASES.

If in the construction of the statute upon which the indictment in this case must rest a doubt arises as to the legislative intent, what, then, is the rule of construction? Unless an express prohibition is found in the statute against doing the acts which are here charged as constituting a fraud intended to be committed against the Government, how can it be said that the trial court erred in quashing the indictment? The essence of the crime attempted to be charged in the indictment is conspiracy to defraud

by doing acts which the statute prohibits. In order, therefore, that the alleged violation of the law shall be made the basis of a crime, it is necessary that the contemplated acts shall be prohibited in clear and express terms. The law is intended to be read and understood by laymen and its terms complied with by them. Its language must be interpreted according to the ordinary and usual meaning of the words employed; and, when so construed, if a doubt arises, that doubt in a penal case must be resolved in favor of the defendant.

This Court, in dealing with the question now under consideration, in the case of *United States v. Keitel*, 211 U. S. 394, said:

"Nor do we deem it necessary to do more than briefly refer to the elaborate statements at bar concerning constructive crimes and the fear which also found expression in the opinion below, that if the words to defraud in any manner or for any purpose receive a broad significance *charges of crime may be hereafter predicated upon acts not prohibited and innocuous in and of themselves, and which, when they were committed, might have been deemed by no one to afford the basis of a criminal prosecution.* It will be time enough to consider such forebodings when a case arises indicating that the dread is real and not imaginary. That they are mere phantoms when applied to the case here presented results from the obvious consideration that the conspiracy charged had for its purpose the doing of acts which were *in clear violation of the direct prohibition of the coal-land laws.*" (Italics ours.)

The case at bar is one in which "the dread is real and not imaginary." The conspiracy charged did not have for its purpose the committing of acts which were "in clear violation of the direct prohibition of the coal-land laws."



In *United States v. Clayton*, 2 Dill. 219, Judge Dillon said:

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offences; but, if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism. Nevertheless the doctrine is fundamental in English and American law that there can be no constructive offences, that before a man can be punished his case must be plainly and unmistakably within the statute, and, if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States. *U. S. v. Morris*, 14 Pet. (39 U. S.) 464, 10 L. Ed. 543; *U. S. v. Wiltberger*, 5 Wheat. (18 U. S.) 76, 5 L. Ed. 37; *U. S. v. Sheldon*, 2 Wheat. (15 U. S.) 119, 4 L. Ed. 199. And see, also, *Ferret v. Atwill*, Fed. Cas. No. 4,747; Sedg. St. & Const. Law, 324, 326, 334; 1 Bish. Cr. Law, 134, 145."

In *United States v. Wiltberger*, 5 Wheat. 76, Chief Justice Marshall said:

"The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. \* \* \*

The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

In *Todd v. United States*, 158 U. S. 282, Mr. Justice Brewer said:

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute.' "

In *France v. United States*, 164 U. S. 676, 17 Sup. Ct. 219, 41 L. Ed. 595, it is said:

"The statute does not cover the transaction, and, however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet, the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. \* \* \* If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate, and not to construe legislation."

In *United States v. Harris*, 177 U. S. 305, 309, the question for determination was whether a penalty

could be recovered from a receiver of a railroad for the violation of an act which provided that if "any company" should confine livestock in cars for more than twenty-eight consecutive hours, it should be liable to pay certain fines. The Court said:

"Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? \* \* \* it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

See also:

Sutherland on Statutory Construction, §§ 518, 520.

*Schooner Enterprise*, 1 Paine, 32.

*The Ben R.*, 134 Fed. 784.

*United States v. Reese et al.*, 92 U. S. 219.

*Bolles v. Outing Company*, 175 U. S. 262.

*United States v. Brewer*, 139 U. S. 278.

*Ex parte Bailey* (Fla.), 23 So. 55.

The latter case contains a clear and apt announcement of the law in the following language:

"The established rule is that a penal law must be construed strictly, and according to its letter. Nothing is to be regarded as included within it that

is not within its letter as well as its spirit; nothing that is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the legislature. And where a statute of this kind contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred."

The trial court committed no error in quashing the indictment and its judgment should, therefore, be affirmed.

Respectfully submitted,

WILMON TUCKER,  
E. C. HUGHES,

Attorneys for Defendant, Charles F. Munday.

TUCKER & HYLAND,  
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Of Counsel.

## APPENDIX "A."

58th Congress, 2nd Session.

S. 4413

IN THE SENATE OF THE UNITED STATES.  
Mr. Heyburn introducing the following bill; which  
was read twice and referred to the Com-  
mittee on Mines and Mining.

## A BILL

To authorize the location of coal lands upon unsurveyed public lands in the District of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person or association of persons qualified to make entry under the coal land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, one hundred and twenty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. No location so made shall exceed forty acres to each person locating, or one hundred and sixty acres to an association of persons composed of not more than four; and all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a

notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will identify the same.

Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated, an application therefor, accompanied by a certified copy of a plat of survey and field notes, made by a United States deputy surveyor or a United States mineral survey, duly approved by the Surveyor General for the District of Alaska, and a payment of the sum of ten dollars per acre for the land applied for; but no such application shall be allowed until after the applicant has caused a notice of presentation thereof, embracing a description of the lands, to have been published in a newspaper in the District of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period of time, and until he shall have furnished proof of such publication and posting; *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

Sec. 3. That during such period of posting and publication, or within thirty days thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall,



within sixty days after filing of such adverse claim, begin an action to determine the right of possession to the premises in controversy in a court of competent jurisdiction within the division of the District of Alaska in which the lands are situated, and thereafter no patent shall be issued for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final judgment or decree of such court therein.

Sec. 4. That all of the provisions of the coal land laws of the United States not in conflict with the provisions of this Act shall continue and be in force and effect in the District of Alaska.

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1911.

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THE UNITED STATES, PLAINTIFF IN ERROR,

VS.

CHARLES F. MUNDAY AND ARCHIE W. SHIELS,  
DEFENDANTS IN ERROR.

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In Error to the Circuit Court of the United States  
for the Western District of Washington.

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**BRIEF FOR DEFENDANT IN ERROR, ARCHIE W. SHIELS.**

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**STATEMENT OF THE CASE.**

This cause comes to the Supreme Court by writ of error to the Circuit Court for the Western District of Washington, to review a judgment quashing an indictment against the defendants in error. The defendants were brought to trial upon the charge of criminal conspiracy (under sec. 5440 R. S.) to defraud the United States of certain coal lands situate within the District of Alaska by conspiring to acquire an excess quantity of land above the amount permitted by law to be purchased by one individual or association.

This proceeding is taken by the United States as plaintiff in error, under the provisions of the

act of Congress of March 2nd, 1907, entitled "An Act providing for writs of error in certain instances in criminal cases" (34 Stat. L. 1246); and the scope of the review is necessarily circumscribed by that act.

The indictment was presented on October 12th, 1910 (Record, pp. 1-24).\*

The defendants were arraigned and entered their plea of "not guilty" on March 28th, 1911 (R. 31), and thereupon the cause came on regularly for trial before the court and jury (Bill of Exceptions, R. 32). The Government made its opening statement which consisted of a mere reading of the indictment (R. 33), and called its first witness, who was asked one question and thereupon the attorneys for the defendants interposed the following objection to the introduction of any evidence, and moved for a directed verdict (R. 32):

"On behalf of each of the defendants, we now formally object to the introduction of any evidence in this case for the reasons and upon the grounds, all of which affirmatively appear:

"1. That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the United States, nor with the violation of any law of the United States.

"2. That said indictment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States.

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\*Note: The record references are to the printed transcript.

"3. That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States.

"4. That if any crime or offense is charged by the indictment, the prosecution thereof was barred by the statute of limitations before the indictment in this case was found or presented.

"5. That it necessarily appears from the indictment and the opening statement of the Government, that no conviction can be had in this case.

"6. Wherefore the defendants, and each of them, now move the court to instruct the jury to return a verdict of not guilty as to the defendants and each of them."

The issues and questions of law raised by said objection and motion were argued by the attorneys for the respective parties on the 29th, 30th and 31st days of March, and were submitted to the Court on April 1st, and taken under advisement by the Court until two P. M. on the 3rd of April, 1911; at which time the Court rendered a decision and ruling upon said objection and motion, which said decision was in writing and contained all the grounds and reasons upon which said decision and ruling were based, and involved a construction of the said indictment, and an interpretation of the statutes of the United States applicable thereto (Bill of Exceptions, R. 32-43).

The defendants' objection and motion were by said ruling and decision overruled solely upon the

ground and for the reason, as decided by the Court, that the indictment charges a conspiracy to acquire coal claims, or property rights to coal claims, in Alaska, for a *foreign* corporation, to-wit: the Pacific Coal and Oil Company (Bill of Exceptions, R. 42-3). It being charged in the indictment that said Pacific Coal and Oil Company, which was one of the two beneficiaries of the alleged conspiracy, was reputed to be a corporation existing under and by virtue of the laws of some foreign government (Indictment, R. 31).

Thereafter, and on the next day, to-wit: April 4th, 1911, counsel for the United States formally withdrew and abandoned the charge in the indictment of the *foreign* or *alien* character of the Pacific Coal and Oil Company as an element of the crime sought to be charged by the indictment (Bill of Exceptions, R. 43).

Thereupon, the defendants in error made the following

### MOTION TO QUASH.

“Defendants now move the court that the indictment be quashed and that the defendants be discharged upon the following grounds:

“1. That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the United States, nor with the violation of any law of the United States.

"2. That the said indictment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States.

"3. That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States.

"This motion is based upon the general grounds that the laws of the United States regulating the disposition of coal lands in the District of Alaska, during the times set forth in the indictment, did not prohibit the transactions, or any of them, charged in the indictment, as contemplated by and a part of the alleged conspiracy therein set forth." (Bill of Exceptions, R. 43).

A juror was then withdrawn agreeably to the procedure recognized in *United States v. Press Publishing Co.* (219 U. S. 1). The motion was granted, the indictment was quashed, and the defendants were discharged, judgment being entered accordingly. (R. 30.)

The Court announced that said ruling, decision, order, and judgment were based upon a construction of the coal-land laws applicable to the District of Alaska, and that the sole grounds therefor were set forth in the aforesaid written opinion rendered by the Court on the 3rd day of April, 1911, in ruling upon the first aforesaid motion and objection by defendants. (Motion for an instructed verdict. Bill of Exceptions, R. 44.)



The Court then wrote an addenda to its said written opinion and filed the completed opinion on April 6th, 1911. (R. 52-64. Addenda, R. 63-4.)

186 Fed. 375.

The Government excepted to the ruling of the Court sustaining the motion to quash and has sued out this writ of error (Bill of Exceptions, R. 45-6).

Plaintiff in error has assigned fifteen specifications of alleged error upon the part of the Circuit Court (R. 46-9). Aside from four of the assignments (first, second, fourteenth and fifteenth), they all relate to the construction of the coal-land laws of the United States applicable to the acquisition of coal lands located upon the unsurveyed public domain within the District of Alaska, as given by the Circuit Court, and all go to the *quantity* of such coal land that may be acquired by a qualified person or association.

The first and fourteenth assignments of error are merely general and formal.

The second assignment challenges the construction given by the Court to the conspiracy statute. (Sec. 5440 R. S.)

The fifteenth assignment challenges the ruling of the Court upon the defendants' motion for a directed verdict. As said motion was overruled

(R. 42-3), an assignment of error upon the ruling denying the motion has no legitimate place in this record, and should be disregarded.

### **WHAT THE INDICTMENT CHARGES.**

The indictment is single, it contains but one count and attempts to charge but one crime, i. e., a criminal conspiracy to acquire Alaska coal lands in an amount in excess of the quantity permitted by law.

The trial court analyzed and construed the indictment as follows:

“The general charge of the indictment is that the four persons named, with divers other unknown persons, did unlawfully (omitting other adjectives) combine, confederate, and agree together to defraud the United States of America of the use and possession of and title to large tracts of valuable coal lands then and there part of the public domain of the United States situated within the Kayak recording district of Alaska, being contiguous tracts and parcels of coal lands collectively and commonly known as the ‘Stracey Group.’

“The indictment specifies that the lands referred to were subject to location and entry under the coal-land laws of the United States applicable to Alaska, and subject to the several attempted locations and entries in a subsequent part of the indictment specified, except for the unlawful, fraudulent, false, feigned, and fictitious character of said attempted locations and entries; and that the value of said lands is ten million dollars.

"The indictment contains other specifications of the nature of the intended fraud, some of which, however, are comprehended within the general charge of the purpose to defraud the United States by divesting the Government of its title to, and proprietary rights in, the coal lands designated, and therefore do not merit additional mention.

"Other specifications of fraud are to the effect that the scheme included interference with the administration of the land business of the United States by deceiving the officers and agents of the Government, in order to induce them to approve the several locations and entries and issue patents conveying the title to the coal lands designated.

"The gravamen of the charge is an unlawful conspiracy to obtain coal land in Alaska for the Alaska Development Company, a corporation of the State of Washington, and the Pacific Coal & Oil Company, reputed to be a corporation organized and existing under the legal authority of some foreign government, to-wit, the Dominion of Canada or one of its Provinces, the quantity of land so to be obtained for said corporation being in excess of the quantity which the law permits.

"The several tracts of coal land to be acquired pursuant to the alleged conspiracy are forty in number, each being specifically described and identified as a coal claim, bearing the name of the individual, locator, and claimant thereof, and by a serial number and by the area thereof expressed in acres and fractions of an acre, each claim being approximately  $\frac{1}{4}$  of a section.

"The plan or scheme embodying the means whereby the object of the alleged conspiracy was to be accomplished are set forth with particularity in articulated paragraphs which I have epitomized as follows:

"The objects and purposes of said unlawful conspiracy were to be furthered and effected by means of unlawful, fraudulent, false, feigned, and fictitious locations, notices of locations, preferential rights to

purchase, applications to enter and purchase, and final entries and purchases under the coal-land laws of the United States; by cunning persuasion and promises of pecuniary reward and other corrupt means persons severally qualified by law (except as stated) should be procured and induced to make the fictitious locations and fraudulent entries of said tracts of coal lands ostensibly for the exclusive use and benefit of themselves respectively, but in truth and in fact for the use and benefit of the Alaska Development Company and the Pacific Coal & Oil Company; the possession of all of said coal lands was to be held and the use thereof enjoyed by persons ostensibly as the agents of, and for the benefit of the individual claimants, respectively, but in truth and in fact as the agent of and for the use and benefit of said corporations; each claimant should be induced, persuaded, and procured to support his unlawful location and fraudulent entry by affidavits regular in form but containing false representations; that each of them, respectively, had opened and improved a coal mine and expended moneys in that behalf and staked out and located a coal claim including within its boundaries said coal mine, and had taken and held possession of said coal claims and intended to purchase from the United States under and pursuant to the coal-land law applicable to Alaska the tract of land so pretended to have been located. By said means the officers of the United States having charge of public-land matters should be deceived and induced to accept, file, and record notices of location and affidavits in the land office, and to segregate said coal lands from the public domain and withdraw the same from public entry under any of the public-land laws of the United States, and rights should thereby be acquired, ostensibly for the benefit of the persons making such false affidavits, but in fact for the said corporations. Thereafter said coal-land claimants, respec-

tively, should hold and exercise their pretended and unlawful preferential rights to purchase said coal lands, ostensibly for their own use and benefit, but in fact for the said two corporations. Thereafter said claimants should, in the form and manner provided by law, make applications to enter and purchase said coal lands, ostensibly for their own use and benefit, but in fact for the said two incorporations, and thereby the said corporations should receive and enjoy the benefits of a greater number of locations and entries of coal lands and for a greater quantity of coal lands than allowed by law. The respective shares and interest of said Alaska Development Company and of said Pacific Coal & Oil Company in the fruits and benefits of the unlawful conspiracy were to be adjusted so that said Alaska Development Company should receive and enjoy the title, use, and value of all of said coal lands, subject to a contract entered into between said two corporations prior to the transactions, and which was in full force and effect at and during all of the times mentioned, by which it was provided that, as between said corporations, the Pacific Coal & Oil Company should be entitled to take and hold possession of said coal lands, operate the mines thereon, and extract the coal therefrom, paying a royalty therefor to said Alaska Development Company, and have an option to purchase all of said coal lands within certain stated times and for certain stated prices.

“Overt acts are charged, substantially, as follows:

That after the formation of said unlawful conspiracy, and in pursuance of and to effect its object, Archie W. Shiels, one of the defendants, did unlawfully on specified dates cause each of the said coal claims to be surveyed by a mineral surveyor of the United States. Said survey being intended for use in applications to enter and purchase the said

coal claims by the respective claimants thereof, and thereafter in further pursuance of and to effect the object of said unlawful conspiracy the said Shiels did knowingly on specified dates file and cause to be filed in the office of the surveyor general of the United States for Alaska each and all of the said official surveys and the field notes thereof. The indictment then sets forth in tabulated form a list of the claims surveyed, with the dates on which the surveys were made and the filing dates, said claims being forty in number and identified by the names of the claimants as the same claims previously mentioned. The indictment then alleges a number of other overt acts in furtherance of and to consummate the conspiracy indicating that the scheme was carried out to the extent of filing applications to purchase said claims by each of the locators and payment of the Government's price to the officers of the local land office for the District of Alaska, in which the lands are situated, and that in the transaction of said business the defendants, or one of them, acted as attorney or agent of all of the locators. The indictment alleges other transactions subsequent to the first day of January, 1910, including written communications referring to money advanced by the Pacific Coal and Oil Company, for which security was to be taken in the form of mortgages to be executed by the several entrymen and payments of money to the receiver of the land office at Juneau, in payment of the Government price for a number of said coal claims. Finally the indictment charges that on a specified date, subsequent to January 1, 1910, one of the defendants paid to the receiver of the land office at Juneau the Government price for thirty-eight of said coal claims.

"It is to be specially noted that the indictment does not charge that the several locators were dummies; on the contrary, it is expressly averred that they were each of them competent to make entries



of coal lands in Alaska, and not disqualified except for particular reasons in the indictment specified, and it is not charged as one of those particular reasons that their locations were illegal because of any failure to do the things which the law makes essential to the acquisition of rights as locators of coal land, nor that more than one coal right was to be or had been exercised by any one locator."

(R. 34, 35, 36.)

It is therefore manifest that defendants are not charged with having conspired to acquire the coal land through "dummy entrymen."

To further elucidate this point, the trial court said, in its opinion upon the law (R. 42):

"It is not to be inferred that the law will permit the acquisition of coal lands in Alaska through the medium of dummy entrymen. In land-office practice dummies are either fictitious persons or those who, having no interest in the transaction, permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfunctorily. A man who opens or improves a coal mine in Alaska and locates a claim in the form prescribed by the statute, including his improvements, and marks its lines and corners so that its boundaries can be readily traced on the ground, and posts and records a notice in conformity to the requirements of the statute, and is then competent and entitled to deal with the claim as his own property, to sell it, lease it, mortgage it, or keep it, and derive for himself all the profits and benefits to be derived from the most advantageous use or disposition of such property, is not a dummy entryman."

It is nowhere charged that the defendants were to be beneficially interested in any of the results; whatever interest they may have had is not disclosed by the indictment. The entrymen were, however, all to be beneficially interested in the transactions; whether they were to receive stock in the corporations, money, or other considerations, is not shown; they were promised "pecuniary reward" (R. 35).

**The Alleged Conspiracy Relates to Segregated and Entered Coal-Lands.**

The trial court further found and held that the first so-called overt act consisted of making the official surveys as a basis for the applications for purchase and patent. Then follows the recitation of the subsequent steps required by statute leading up to patents, including the payment of the purchase money which was paid to the Government (R. 36).

It should be particularly noted, and we desire to emphasize the point, that there is an entire absence of any charge of the doing of a single act prior to the making of the official surveys, which are required to be made, as the basis for applications for patents under the provisions of section 2 of the act of April 28th, 1904 (33 Stat. 525), this being the act providing for the disposition of such coal lands in Alaska.

No overt act is charged with respect to any of the steps relating to the original location and entry

which are required to be taken prior to the making of the patent surveys and which are specified in section 1 of said act as the things to be done to perfect the location—that is, to segregate the land from the public domain.

It is not shown when the original locations and entries were made. The Alaska coal-land statute was passed by the Congress on April 28th, 1904 (33 Stat. 525). The alleged conspiracy is said to have been formed on May 1st, 1905 (R. 33). More than a year's time had elapsed since the enactment of the Alaska statute and before the date of the organization of the alleged conspiracy. The indictment wholly fails to charge the doing of any act, with respect to the making of the original locations and entries, as provided in section 1 of the statute, and all of which acts must necessarily have preceded the making of the surveys under section 2 as the basis of purchase of the located claims.

We therefore desire to remark, in passing, that we shall contend that the indictment in this case commences and ends with section 2 of the Alaska coal-land statute (*Williamson v. United States*, 207 U. S., pp. 456-9) and necessarily deals only with certain coal claims that had, before the organization of the so-called conspiracy, been located, entered, and segregated from the public domain.

While it is true that the indictment charges that the conspiracy contemplated the procuring of the entrymen to make false locations and file false location notices, these allegations, with respect to the initiatory steps, are necessarily negatived by the allegations that the lands, concerning which the conspiracy was formed, consisted of forty certain "coal claims," each claim having a known area, which claims are further identified as being commonly known as the "Stracey Group." The very term "coal claim" means that the tract to which it is applied had been claimed and located so as to give to it the identity and individuality of a segregated tract—a claim with a fixed legal status. This, coupled with the entire omission to charge any act or thing concerning the original location or entry of either of said forty coal claims, leads irresistibly to the legal conclusion that the coal lands specified in the indictment as the subject of the so-called conspiracy, consisted, at the time of the formation of said alleged conspiracy, of forty staked, located, and segregated coal claims, which had theretofore been legally entered under the provisions of section 1 of the act of April 28th, 1904 (the only act under which they could be entered), and that said forty coal claims were then subject to survey and application for patents—that said locations were all lawful.

Such is also the construction placed upon this

element of the charge in the case at bar by the United States Land Department, as evidenced by its decision in the Cunningham coal claims (*United States v. Andrew L. Scofield, et al*) rendered by the Commissioner and approved by the Secretary on June 21, 1911. We quote from page 53 of the printed decision as follows:

"In the cases of *United States v. Charles F. Munday, et al* (this case), and *United States v. Charles H. Doughton, et al*, decided recently by the United States Circuit Courts for the Western and Eastern Districts of Washington, respectively, there was a difference of opinion expressed by the courts as to the construction to be given some of the provisions of the act of April 28, 1904. The decision in the *Doughton* case sustained the Government's contention therein, but even though it be conceded that the decision adverse to the Government in the *Munday* case should ultimately prevail, it is not seen how it would affect the merits of this case. *The decision in that case was predicated upon the theory that the several locations were lawful, while in this case it has been specifically alleged and proven that each location was unlawful," etc.* (Italics ours.)

Concretely stated, therefore, the facts with which defendants are charged are as follows: With having agreed to induce forty bona fide citizens of the United States, each being fully qualified under the laws to enter coal lands in Alaska, to acquire severally, and patent, forty separate coal-land claims in Alaska, all of which, so far as the indictment discloses, had been previously located and entered by

said forty entrymen respectively. Each locator or entryman was to secure patent to one claim, the area of which does not in any case exceed 160 acres, with an agreement or understanding by all parties concerned that after the lands should be patented, the legal title to the several coal claims was to be transferred to an American corporation, and another, likewise (by the withdrawal by the Government of the charge of its *alien* character, R. 43) conceded to be a domestic corporation, was to have a leasehold interest therein with the right to mine coal upon said coal lands, coupled with an option of purchase thereof.

We are not, however, driven to a construction of the indictment which restricts the lands in question to segregated entries, although contending as we do that this is the true and logical meaning of the charge taken as a whole, and as analyzed by the trial court; we shall contend broadly that the law does not prohibit any of the acts charged with respect to unlocated Alaska coal lands.

#### **THE SCOPE OF THE REVIEW.**

This Court is limited by the act of Congress, under which the writ of error is allowed (34 Stat. 1246) to a review of the construction of the statutes upon which the indictment is founded.

The review act does not authorize the appellate court to revise the action of the court below in its



construction of the indictment; but in the exercise of its power of review, this Court will accept the construction of the indictment as given by the lower court, and test in that aspect the court's construction of the statutes on which the indictment was founded. The review act cannot be extended beyond its terms.

*United States v. Keitel*, 211 U. S. 370; 397-9;

*United States v. Biggs*, 211 U. S. 507-522;

*United States v. Dickinson*, 213 U. S. 92; 102-3;

*United States v. Mason*, 213 U. S. 115; 121-3;

*United States v. Stevenson*, 215 U. S. 190-194;

*United States v. Kissel*, 218 U. S. 601-606;

*United States v. Heinze*, 218 U. S. 547-551;

*United States v. Barber*, 219 U. S. 72-78.

It will therefore be observed that, under the rules of practice and procedure announced in the foregoing decisions, the scope of inquiry and decision imposed by this review is confined to the interpretation of the coal-land laws as they existed on May 1st, 1905 (the date of the formation of the alleged conspiracy), which were then applicable to the acquisition of unsurveyed coal lands of the United States lying within the District of Alaska, and, when tested by the rules of judicial construction, to apply those laws to the charge laid against the defendants, as the indictment has been con-

strued by the Circuit Court, and thus ascertain whether the indictment charges the defendants with a conspiracy to defraud the United States.

**Section 5440 Revised Statutes Was Correctly Construed by  
the Circuit Court.**

The defendants are charged, under sec. 5440 R. S., with criminal conspiracy to defraud the United States by obtaining an excess quantity of coal lands in Alaska in violation of the provisions of the laws of the United States applicable to the disposition of such coal lands,

“And the rules and regulations applicable thereto, then and there in force, and which had theretofore been lawfully established under the authority of the laws of the United States by the Commissioner of the General Land Office with the approval of the Secretary of the Interior.” (R. 3).

The effect of the charge is to bring sec. 5440 R. S. and the Alaska coal-land laws together, and the test of the charge is to ascertain whether the thing which defendants are alleged to have conspired to accomplish, would, if accomplished, constitute such a violation of the Alaska coal-land laws as to imply a criminal intent on the part of defendants to defraud the United States.

The indictment charges that the object of the conspiracy was an illegal purpose—that is to say, it contemplated the acquisition by a corporation of

more coal land than the amount permitted by law. The alleged fraudulent purpose does not relate to the acquisition of any land, by the means to be employed, but the fraudulent element is predicated upon the theory that the object of the agreement was to acquire *too much land*.

Absolutely the only point in issue, when the indictment is stripped of its verbiage, relates to the quantity of coal land involved, to-wit: 6087 acres.

To be more specific, the indictment charges (R. 2) that the defendants

“did unlawfully \* \* \* conspire \* \* \* to defraud the United States of America of the use and possession of and title to large tracts of valuable coal lands \* \* \* situated within \* \* \* the District of Alaska;”

and (R. 3)

“The object and purpose of said unlawful conspiracy were to deprive and defraud the United States of its title, possession, use and enjoyment of the said coal lands, and obtain said coal lands, and the title, possession, use, and enjoyment thereof for the benefit of a certain private corporation;”

and (R. 4)

“The said coal lands, of which the United States was to be defrauded as aforesaid, consisted of approximately 6,087 acres, situated in a compact body, situated westerly from, and in the immediate vicinity of, Kushtaka Lake and Kushtaka Glacier, and situated approximately seventeen miles

northeasterly from Katalla, in the Kayak recording district, in the District of Alaska. Said compact body of coal lands is composed of those certain contiguous coal claims, being forty in number, hereinafter more particularly described. Said coal claims are commonly known and described collectively as the 'Stracey Group,' and are so described and mentioned herein."

(The coal claims are then specifically described by name, number, and exact area, even to fractions of acres.)

And (R. 8):

"That thereby the said Alaska Development Company and said Pacific Coal and Oil Company should receive and enjoy the benefits of a *greater number* of locations and entries of said coal lands, and for a *greater quantity* of said coal lands, than allowed by law." (*Italics ours.*)

In construing the indictment, the court below found (R. 34) that:

"The gravamen of the charge is an unlawful conspiracy to obtain coal land in Alaska for the Alaska Development Company, a corporation of the State of Washington, and the Pacific Coal and Oil Company, reputed to be a corporation organized and existing under the legal authority of some foreign government, to-wit, the Dominion of Canada or one of its Provinces, the quantity of land so to be obtained for said corporation being *in excess* of the quantity which the law permits.'" (*Italics ours.*)

(The alleged foreign or alien character of the

Pacific Coal & Oil Company was later abandoned by the Government, R. 43.)

Sec. 5440 R. S. upon which the indictment was founded reads as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

This statute covers two crimes, i. e., a conspiracy to commit an offense against the United States *or* a conspiracy to defraud the United States.

That defendants were indicted under the second element of the statute—to defraud the United States—is perfectly manifest. This is evidenced by the charge itself and by the construction given to the indictment by the lower court.

The indictment could not cover both offenses without being bad for duplicity. (Sec. 1024 R. S.)

Therefore, it comes to this, that the defendants stand charged with conspiring—not to obtain a lawful quantity of land by unlawful means, which would involve the commission of an offense against the Government in the procedure, but with conspir-

ing to defraud the United States by acquiring an excess quantity of land, to-wit: an amount over and above some quantity which the Government assumes might be lawfully acquired.

The Government cannot take the position that the indictment charges a conspiracy to commit a crime against the United States without abandoning its theory that the offense rests upon a conspiracy to defraud the United States by acquiring an *excess* quantity of coal lands.

If it is assumed that the alleged offense relates to the means which were to be employed rather than to the object to be accomplished, as, for instance, a conspiracy to commit the crime of subornation of perjury of the entrymen, such as was charged in the Williamson case (207 U. S. 425), then it must be admitted that the object to be attained was lawful, and that by proper steps and procedure, the quantity of Alaska coal land involved here might be lawfully acquired.

And so it appears that the trial court correctly construed sec. 5440, as applied to the indictment in this case.

#### THE LAW QUESTIONS INVOLVED

Require a Construction of the Coal-Land Laws Applicable to the Acquisition of "Unsurveyed" Coal Lands Embraced in the Public Domain, Within the District of Alaska (to Which Class the Lands in Controversy Belong).



Our contentions, to which the arguments and citations, under the various subdivisions, in this brief will be directed, are:

A. There is but one act of Congress applicable to the acquisition of unsurveyed coal lands in Alaska, viz: the act of April 28th, 1904 (33 Stat. 525). Said act is complete within itself, with the single exception relating to the qualification—citizenship of the locators—which is borrowed from the general laws (sec. 2347, R. S.).

B. The Alaska coal-land laws expressly permit and encourage assignments and alienation of coal-land locations and claims before purchase, final proof, or survey, and it being lawful to sell, it must be lawful to buy.

C. Alienation not being prohibited but being affirmatively recognized and permitted by statute, one may lawfully agree before location to alienate his claim after location, as it cannot be made unlawful to agree in advance to do a lawful act.

D. There is no limitation upon the number of located Alaska coal claims that one may buy and carry to patent if he be a citizen of the United States.

E. By his initiatory location, under the Alaska coal-land laws, a locator acquires an estate in the

land, such as will pass by descent and which may be freely sold and alienated.

F. Even though the general coal-land laws of the United States (secs. 2347-2352 R. S.) were to be read into the Alaska act of 1904, and the two sets of laws construed *in pari materia*, the results would not be changed, as there is nothing in the Alaskan situation for the general laws to operate upon except the one formal matter of citizenship of the locator.

G. No rule or regulation of the Land Department of the United States can enlarge, restrict, or modify the federal statutes, nor make that criminal which the statute does not prohibit or condemn.

H. Criminal conspiracy cannot exist in this case unless the object to be accomplished by the agreement be unlawful, and, under a true construction of the coal-land laws applicable, this is impossible. There can be no crime in conspiring to induce men to do that which the law permits them to do.

I. Defendants are entitled to a strict construction of the statutes in their favor. Nothing can be read into the law or implied to their prejudice. The rule of construction of penal statutes will not permit the indictment to stand, even though the coal-land laws are found to be vague or uncertain, and might be adversely construed in an equitable action. No criminal intent is shown.

**THE ALASKA COAL LAND ACT OF APRIL 28TH, 1904.**

(33 Stat. 525)

**With a Brief History and Review.**

**This Act Provides the Exclusive Method for Acquiring Title to Unsurveyed Coal-Lands Within the District of Alaska. It Carries No Restrictions Against, Nor Limitations Upon, Alienation, but Affirmatively Recognizes Assignments.**

“An Act to amend an act entitled ‘An act to extend the coal-land laws to the district of Alaska,’ approved June sixth, nineteen hundred.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

"Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws; Provided, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

"Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such ad-

verse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

"Sec. 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this Act shall continue and be in full force in the district of Alaska."

Prior to the enactment of the foregoing statute of 1904, Congress had not provided any effective means for acquiring title to an acre of coal lands in Alaska. The general coal-land laws of the United States (secs. 2347-2352 R. S.) had been extended to Alaska, by mere reference, by act of June 6th, 1900 (31 Stat. 658), but these laws were entirely inoperative and non-effective because they apply only to surveyed lands, and there were no surveyed lands in Alaska.

Title to unsurveyed coal lands cannot now, and never could be, acquired under the general laws. Those laws operate exclusively upon public lands over which the United States land surveys have been extended. Entries can be made under them only by legal subdivisions, after the township plats have been filed.

The system of public land surveys had been nominally extended to Alaska by the act of March 3rd, 1899 (30 Stat. 1098); but no actual surveys

were ever made, no standard or base lines were even established, and the application of the general coal-land laws to the District of Alaska was therefore futile. The act was a dead letter. It could never operate in the district until the system of United States surveys should be extended over it, and the lands brought under the township and subdivisinal system.

The Department of the Interior promptly recognized this condition. The Commissioner of the General Land Office, in announcing the passage of the act of June 6th, 1900, then well realizing its impotency, did, on June 27th, 1900, by official circular approved by the Secretary of the Interior, instruct the Register and Receiver of the Juneau Land Office (the only land office in Alaska) as follows:

"Your attention is directed to the following act of Congress, approved June 6, 1900, extending the coal land laws to the District of Alaska:

(Then follows the Act)

"Under the coal-land law, sections 2347 to 2352, inclusive, of the Revised Statutes, and the regulations thereunder issued July 31, 1882, coal land filings and entries must be *by legal subdivisions* as made by the regular United States survey.

"Section 2401 of the Revised Statutes, as amended by act of August 20, 1894, is as follows:

(Then follows sec. 2401, R. S.)

"Under said section 2401 as amended, persons and associations lawfully possessed of coal claims,



upon unsurveyed lands, may have such claims surveyed, provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys.

“Although the system of public land surveys was extended to the district of Alaska by a provision contained in the act of Congress approved March 3, 1899 (30 Stat. 1098), no township or subdivisional surveys have been made, nor have any standard lines or bases for township and subdivisional surveys been established, within the district; therefore, until the filing in your office of the official plat of survey of the township, no coal filing nor entry can be made.

Approved: E. A. HITCHCOCK, Secretary.”

XXX. Land Decs. pp. 368-369.

We therefore have the official declaration of the United States Land Department of the attempt and failure of Congress to make provision by an effective law for the acquisition of coal lands in Alaska.

The Senate of the 58th Congress, by resolution No. 16, adopted March 19th, 1903 (Congressional Record, p. 139), instructed its Committee on Territories to sit during the ensuing summer recess at such times and places as the committee might deem wise, to consider legislation for Alaska.

Pursuant to said resolution, a sub-committee consisting of Senators Dillingham, Nelson, Burnham, and Patterson spent about two months in Alaska during the summer of 1903 traveling, tak-

ing evidence, studying, and investigating the natural resources and as well the physical, social, and financial conditions, and generally the needs of the district.

The report of this sub-committee was filed in the Senate on January 12th, 1904, and ordered printed. (Report No. 282, 58th Congress, 2nd Session.) At page 8 of the printed report, it is said:

“The annual coal production is approximately four or five thousand tons with a value of from forty to fifty thousand dollars. This will probably be very much increased, as explorations of some extent have been begun during the past season.”

At that time there was no law in force under which title to coal lands in Alaska could be legally acquired, although some coal had been mined as shown by the committee report, and it is manifest that coal lands had been occupied to some extent. Section 1 of the 1904 act recognized prior occupation by providing that location notices should be filed “within one year from the passage of this act” (referring to prior locations) “or within one year from making such location” (referring to future locations).

Ever since 1864, coal lands had been and still are classified as mineral lands within the meaning of the United States public-land laws by both legislative and judicial construction.

This point was clearly decided in 1882 by Judge Sawyer in *United States v. Mullan* (10 Fed. 785), who said, in considering the question as to whether certain coal-bearing lands in controversy had been open to selection by the State of California as non-mineral lands (p. 788):

"It is conceded that prior to the passage of the act of 1864, cited, the land department at Washington did not regard or treat coal lands, or coal mines, as mineral lands within the meaning of the prior acts of Congress. It is so stated by Commissioner Drummond. In re Yoakum, Copp's Public Land Laws, 674. But I am not aware of any judicial construction of these words of the statute as relating to coal lands. Whatever the proper judicial construction may have been prior to the act of 1864, Congress has itself, in that act, given a legislative construction to the provisions in question, which is conclusive upon the Courts and departments from that time forward."

The act of July 1, 1864, therein referred to, is found in 13 Stat. 343, and provided (sec. 1):

"That where any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which, as 'mines,' are excluded from the preemption act of eighteen hundred and forty-one, and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum."

The decision in the *Mullan* case was affirmed by this Court in 118 U. S. 271, Chief Justice Waite remarking (p. 276):

"The important question in the case is whether the land, being coal land, was open to selection by the State as lieu school land. This was most elaborately considered by the circuit judge, and his opinion, reported in *United States v. Mullan*, 7 Sawyer, 466, leaves little to be said on the subject."

And in *Northern Pacific Railway Co. v. Soderberg*, 188 U. S. 526, Mr. Justice Brown, speaking for the Court, held (p. 529) that lands valuable solely or chiefly for granite quarries are mineral lands within the "non-mineral" exception in the railway land grant of 1864, and refers to the earlier decision in the *Mullan* case as follows:

"Relying largely upon this act as a 'legislative declaration' this Court held in *Mullan v. United States*, 118 U. S. 271, that coal lands are mineral lands within the meaning of that term as used in the statutes regulating the disposition of the public domain."

On May 1st, 1872, Congress passed a law (17 Stat. 91) entitled "An Act to promote the development of the mining Resources of the United States." The first section of this act reads as follows:

"That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which

they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

This section was brought forward and has been since retained as sec. 2319 R. S.

After the sub-committee returned from Alaska, Senator Burnham prepared and on December 18th, 1903, introduced Senate Bill 2814 to amend the act of June 6th, 1900, so as to put in force some effective legislation for the acquisition of Alaska coal lands. This bill was referred to the Committee on Public Lands (Congressional Record, p. 360) and by that Committee referred to the Secretary of the Interior.

The Commissioner of the General Land Office, Mr. Richards, either redrafted the Burnham bill, or substituted the text from some of the other several bills then before Congress and submitted it to Secretary Hitchcock, who in turn approved the suggestions of the Commissioner, and forwarded the same to the Public Lands Committee, who in turn reported it to the Senate (Congressional Record, p. 2645) with one single amendment, to-wit: the striking from the bill of the following restriction on the sale of coal, as recommended by the Department of the Interior:

“\* \* and no coal shall be mined for sale outside of said district until a patent shall have issued for the land from which it is mined,”

for the reason stated that:

“The committee do not deem it wise to place this restriction upon the disposal of coal mined in Alaska before issuance of patent.”

The report continues:

“There is a pressing need of legislation of the kind suggested in the proposed bill. As the laws now stand claimants cannot secure title to coal lands in Alaska.” (58th Cong. Misc. Sen. Rep. No. 1188, p. 2.)

The bill, as reported, was then further amended in the Senate at the suggestion of Mr. Burnham, in section 1, line 25, page 3 of the printed bill; after the word “mines” the word “are” was substituted for the word “or”—to correct a purely clerical error. (These slight changes are mentioned merely to show how clearly the law followed the recommendations of the Land Department). On page 4, line 15, section 2, the word “shall” was substituted for the word “may” to make it mandatory—“shall receive a patent, etc.”; and as so amended, the bill passed the Senate on March 10, 1904 (Congressional Record, p. 3083), and ultimately passed the House on April 28th, 1904 (Ib. 5828), after a conference at which the words “six months” were inserted in lieu of “30 days” to extend the time provided by



section 3 for asserting adverse claims; and as so passed, it became a law by executive approval on the same day.

Meanwhile, other bills had been introduced in Congress, all tending to emphasize the fact that the lawmaking body was then alive to the utter failure of the act of June 6th, 1900, to operate in Alaska, and as well to the urgent needs of the District for a practicable, workable coal-land law, in place of that impotent law, as Secretary Hitchcock had originally declared it to be.

When the Senate bill reached the House, there was then pending before that body, House Bill 8869. It was proposed by said House Bill to adapt the general coal-land laws to the Alaska coal lands by providing for their entry and purchase "*according to the provisions of the said (public) coal land laws,*" by the adoption of private surveys.

The House did at first substitute its own bill for the Senate bill, but receded after conference, and accepted the plan as proposed by the Senate. (Congressional Record, p. 5828).

The essential difference between these two proposed systems is extremely radical, in that the House bill proposed actually to transplant the general coal-land laws and adapt them to the Alaskan situation, while the Senate bill (which prevailed) proposed a new and independent law especially and exclusively

adapted to the conditions of Alaska. For instance, the general coal-land laws limit the individual purchaser to one entry, and the area to 160 acres (secs. 2347, 2350). The Senate bill contains no such limitations. The general law is silent upon the subject of alienation. The Senate bill (sec. 2) expressly recognizes assignments and directs that assignees *shall* receive patents.

The general law (sec. 2347) offers *vacant* surveyed coal-lands in limited areas, by legal subdivision. The Senate bill (sec. 1) requires as conditions precedent to entry of unsurveyed lands in Alaska, that a coal mine or *mines* (plural) shall have been opened or improved, but does not limit the area of land which may be entered; it merely describes the form and size of the *tracts* (plural) that may be entered to include the opened and improved mine or *mines* (plural). The general laws (sec. 2347) fix *minimum*, but not *maximum*, rates of \$10.00 and \$20.00 per acre, based upon proximity to railroads, for the *surveyed* lands; while the Senate bill (sec. 2) fixes a nominal flat rate of \$10.00 per acre for the *unsurveyed* Alaska lands. (Coal lands in the states are graded, classified, and appraised. Regulations, XXXVII Land Decisions 653). The scheme of acquisition under the general coal-land laws is by *cash entry*, while under the Alaska act the "entry" is made by discovering, opening, marking the ground with permanent monuments,

and filing location notice in the recording district and with with the register and receiver of the U. S. land office; and four years time is allowed to pay for the land. The new act is more nearly analogous to the mining laws, under which title may be acquired to mineral lands of the United States.

The general laws (sec. 2351) provide that contests shall be settled in the Land Department. The Senate bill (sec. 3) sends the contestants to the courts of competent jurisdiction within the district of Alaska, where the *title* is to be quieted and awarded. Congress had theretofore established a court of competent jurisdiction in Alaska, empowered to try and adjudicate adverse claims of title to interests and estates in real property. (Sec. 475, Act of June 6th, 1900, 31 Stat. 410, adopted as a part of the political code of Alaska.)

In fact, the entire plans, schemes, and aims of the two sets of laws are as unlike as they could well be made. The old law operates upon surveyed public lands in localities near enough to the centers of civilization to be brought under the system of public land surveys. The Alaska act operates upon unsurveyed lands situate in that great wild expanse of some 600,000 square miles called Alaska, far remote from township surveys, lines of transportation, and all other evidences of modernized progress.

As was well said by the learned judge who presided in the Court below (R. 41):

"Congress intended to enact a practicable, workable law, and if its second attempt to do so be not made futile by misconstruction, we have such a law. It is not a law made to serve the purpose of monopolists who would keep the coal of Alaska locked up within her mountain walls, nor is it based upon any fantastic notion that trusts can be annihilated by giving coal rights to no one except the man who by personal toil may dig the coal and carry it to market upon his back or upon his head. It is the duty of the Court to not misconstrue the law, nor stigmatize the Congress which enacted it and the President who approved and signed it, by imputing to them a lack of either sense or honesty."

Section 4 of the 1904 act is a mere legislative declaration of the common law. It adds nothing to the situation as it would exist had it been omitted. The general coal-land laws had theretofore (in theory only) been extended to Alaska by the simple act of June 6th, 1900, but they did not and could not apply to unsurveyed lands. The new 1904 act was intended to operate solely upon the unsurveyed lands in Alaska, thereby offering an entirely new, separate, and distinct class of coal lands, one that had not theretofore been offered for sale; and to set forth an entirely new and exclusive method for the sale and acquisition of such unsurveyed Alaska coal lands. No conflict could arise as between the general laws which had been nominally extended to the district, with respect to surveyed lands, to which class

they alone could apply; and the special act, with respect to the disposition of unsurveyed lands, to which class the new act exclusively applied; because no unsurveyed lands could be entered under the general laws, and vice versa. If it is sought, however, to apply the provisions of the general law to the acquisition of unsurveyed Alaska coal lands, then the conflict between the two laws is absolute and irreconcilable. But the time may come in the uncertain future when at least some portions of Alaska will be brought within the regular range of progress of the public surveys, and then, but not until then, when any official plats of surveyed Alaska townships are filed, the general laws will operate upon any coal-lands of the United States lying within such surveyed townships. This is precisely what Congress had been told by the Secretary of the Interior in his official circular of June 27th, 1900 (*Supra*, p. 29).

Inasmuch as the general laws had already been extended to the district, and the special act of 1904 did not in any manner affect those general laws (so far as performing any future function within their scope was concerned), they would have continued dormant, precisely to the same effect, either with or without section 4 of the act of 1904.

The title of the new act, "An Act to amend an act entitled 'An act to extend the coal-land laws to the district of Alaska' approved June sixth, nineteen

hundred," coupled with the declaration in section 4, "That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this Act shall continue and be in full force in the district of Alaska," manifests the intention of Congress to enact a special statute applicable to the unsurveyed lands in the district; and also to make it clear that the general laws, which had already been extended to the district, should be held in force for future use, whenever they might become effective by the extension of the surveys. This would have followed just as certainly without section 4, but it was doubtless included through an abundance of caution to make the point clear.

There is absolutely no conflict between the special act and the general laws, when applied to their respective functions and classifications of coal lands as Congress intended; but when they are sought to be merged and all applied to the unsurveyed lands in Alaska, as is manifest by the indictment in this case, the conflict is irrepressible.

In the one single matter of qualification of the locator—that is, the status of his citizenship—do we need to refer to the general law. This is the only function of the general laws, as applied to the acquisition of coal lands in Alaska.



Section 1 of the Alaska act provides:

"That any person or association of persons *qualified* to make entry *under the coal-land laws of the United States*, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may *locate*, etc."

We look to section 2347 R. S. and there ascertain that:

"Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to *enter*, etc."

It is thus apparent that a citizen or a declared citizen may *enter* coal lands under the general law, and carry the same to patent; that persons so qualified may *locate* coal claims in Alaska, but by section 2 of the Alaska act only *full* citizens may carry the located Alaska claims to patent. Here we find an absolute and irreconcilable conflict. No one may take title to an acre of coal land in Alaska unless he be a full citizen, and there is no limitation upon the quantity of land that a citizen may purchase; while in Colorado, for instance, any one who has declared his intention to become a citizen may enter and purchase not to exceed 160 acres, or if an association, 320 acres or 640 acres, as the case may be, but no more.

**THE POWER OF CONGRESS TO DISPOSE OF THE PUBLIC DOMAIN IS ABSOLUTE AND EXCLUSIVE.**

“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” (Constitution, Art. IV, Sec. 3, Clause 2.)

The power of Congress is exclusive.

*U. S. v. Fitzgerald*, 15 Pet. 407.

The disposal of the public domain must be left to the discretion of Congress without limitation.

*U. S. v. Gratiot*, 14 Pet. pp. 537-8.

Congress has the absolute and exclusive right to prescribe the times, conditions, and mode of transferring the national public lands, or any part of them; and to designate the persons to whom the transfers shall be made. The power of Congress is plenary.

*Gibson v. Chouteau*, 13 Wall, p. 99;

*Irvine v. Marshall*, 20 How. 558;

*Frisbie v. Whitney*, 9 Wall. 187;

*Shepley v. Cowan*, 91 U. S. 330;

*Buxton v. Traver*, 130 U. S. 232;

*Gonzales v. French*, 164 U. S. 338.

The rules and regulations of the Federal Land Department cannot enlarge or restrict the provisions of the acts of Congress.

*Webster v. Luther*, 163 U. S. 331;

*Williamson v. U. S.*, 207 U. S. 425.

## MEANING OF THE TERM "ENTRY" IN THE PUBLIC LAND LAWS.

It Is Synonymous With "Location" in the Alaska Coal-Land Act.

"The term 'entry' as used in reference to public lands means, in its technical sense, the filing with the register of the land office of a claim to a portion of the public lands for the purpose of acquiring an inceptive right thereto."

32 Cyc. p. 806.

The word "entry," as used in the public land laws, was judicially defined by this Court in 1827. In *Chotard v. Pope*, 12 Wheat. 586, Mr. Justice Johnson gave to us the following definition (p. 588):

"The term '*entry*,' as applied to appropriations of land, was probably borrowed from the State of Virginia, in which we find it used in that sense at a very remote period. Many cases will be found in the reports of the decisions of this Court, in which the title to western lands were drawn in question, which will show how familiarly and generally the term is used by Court and bar. Its sense, in the legal nomenclature of this country, is now as fixed and definite as that of many terms borrowed from the common law. It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States. In the natural progress of langu-

age, the term has been introduced into the laws of the United States; and, by reference to those laws, we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States, at private sale."

In *Sturr v. Beck*, 133 U. S. 541, Chief Justice Fuller, speaking of what constitutes an entry of public lands, said (p. 547):

"A claim of the homestead settler, such as Smith's, is initiated by an entry of the land, which is effected by making an application at the proper land office, filing an affidavit and paying the amounts required by sections 2238 and 2290 of the Revised Statutes."

In *Denny v. Dodson*, 32 Fed. 899, Mr. Justice Field, sitting in the Ninth Circuit, said (p. 910):

"It (the term of entry) is used to designate the initiatory proceeding taken for the acquisition of a portion of the lands of the United States which are open to private sale;"

citing with approval *Chotard v. Pope, supra*.

In *Northern Pacific R. R. Co. v. Sanders, et. al.*, 47 Fed. 604, at page 607, Judge Knowles quoted with approval the definition of the word "entry" given by Mr. Justice Johnson in *Chotard v. Pope, supra*.

In *United States v. Four Bottles Sour Mash Whiskey*, 90 Fed. 720, at page 723, it is said by Judge Hanford:

“The word ‘entry,’ as it has been heretofore used in the land laws of the United States, ‘means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim.’ ”

In *Hastings etc. Railroad Co. v. Whitney*, 132 U. S. 357, Mr. Justice Lamar said (p. 360-1):

“The doctrine first announced in *Wilcox v. Jackson*, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it, has been reaffirmed and applied by this Court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

“In *Witherspoon v. Duncan*, 4 Wall. 210, this Court decided, in accordance with the decision in *Carroll v. Safford*, 3 How. 441, that ‘lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained.’ And the Court further held that this applies as well to homestead and preemption as to cash entries. In either case, the entry being made, and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of public lands, and takes the character of private property.”

It is therefore fair to assume that if section 2350 R. S. is to be imported into the Alaska coal-land act, and there given force, the word “entry”

must be confined to the initiatory acts of location, described in section 1 of the 1904 act. Thus construed, "location" is synonymous with "entry," and "locators" are "entrymen;" and the laws would clearly mean that no one person should make more than one location; but they could not mean that a citizen could not buy more than one entered or located claim.

The indictment does not charge that the laws so construed have been violated. The most that is claimed is that the locators or entrymen made prior agreements to sell or to part with their title for a consideration. This, we insist, they had a perfect right to do, even though both sets of statutes are brought together and read as one act; and, as well, if the rule of the Land Office (which will be hereafter referred to), requiring the locators to purchase for their own benefit, is also read in; as it must be inferred that the entrymen were acting for their "benefit," as the word has been judicially construed. There is no intimation contained in the indictment that defendants were over-reaching or dealing unfairly with the locators. The entrymen were acting freely upon their own volition in exercising their free rights of American citizenship, to file on coal lands, that the Congress had offered them.



**THE WORDS "USE" AND "BENEFIT" HAVE RECEIVED  
FREQUENT JUDICIAL DEFINITION.**

**They Mean the Full Use and Benefit Including the Freedom  
of Sale and Purchase.**

"Use" and "Benefit" are synonymous terms.

29 Am. & Eng. Ency. of Law, 439;

*Leggett v. Perkins*, 2 N. Y. 309;

*Heaston v. Randolph County*, 20 Ind. 403.

"Benefit" means advantage, profit, use."

3 Am. & Eng. Ency. of Law, 1034;

*Fitch v. Bates*, (N. Y.) 11 Barb. 473.

"Benefit: Advantage; profit; gain; account; interest; use; whatever contributes to promote prosperity or add value to property."

5 Cyc. 682 (with citations).

"Whatever contributes to promote prosperity; to add value to property; advantage; profit"—is a benefit.

*Synod of Dakota v. State*, 50 N. W. p. 635;

14 L. R. A. p. 422.

"The word 'benefits,' when used unqualifiedly, is a comprehensive term, including direct or special benefits, and indirect or general."

*Ferguson v. Borough of Stamford*, (Conn.)

22 Atl. p. 787.

"The word 'benefit,' unrestricted, means the whole benefit, the entire beneficial interest. Where

property is given, granted, or bequeathed to certain individuals, to be used, appropriated, and applied for their benefit, and in such a manner that no other person or persons have or can have any interest in it, they thereby become, in effect, the absolute owners of it, and may exercise all the rights belonging to them in that relation."

*Paine v. Farsaith* (Me.) 30 Atl. 11 (Citing *Smith v. Harrington*, 86 Mass. 566).

"'Benefit' in a conveyance for the benefit of a university, is equivalent to advantage, not to occupation; advantage by occupying, renting, selling, or otherwise. 'Benefit' includes 'occupation,' but is not confined to it. It is a broad word."

*Lawe v. Hyde*, 39 Wis. p. 359;

1 Words & Phrases 751.

"We must assume that the word 'benefit' is used in its legal sense,—that of the direct and absolute enjoyment of the money to be paid or of its use."

*Rockhold v. Canton Masonic etc. Soc.* (Ill.) 21 N. E. p. 795.

It is therefore unquestionably true that, under a law so requiring, one might legally take land for *his own benefit*, well knowing at the time that he was going to sell it, yea, knowing that he had agreed to sell it before he applied to purchase, without violating the letter or spirit of the statute. And if the Department rule were valid, requiring the applicant to swear that he was applying to purchase Alaska

coal land for his *own benefit*, his prior agreement to sell could not conflict with his oath. He would be entitled to all the benefits he might derive from the entry. In other words, to the full benefit, including the freedom of contract and of sale.

We are not dealing with a statute inhibiting alienation, or prohibiting agreements to sell before title vests, such as the homestead law.

It must be conceded that public lands can be purchased or acquired only upon the terms and conditions imposed by Congress. And where there is no prohibition against alienation, none may be imported into the transaction. The grant cannot be encumbered.

**THE FREEDOM OF SALE AND PURCHASE IS ABSOLUTE UNLESS RESTRICTED BY STATUTE.**

**No Restriction Is Contained in the Alaska Coal-Land Laws. By Locating a Coal-Land Claim in Alaska, an Estate Is Created in the Land, Which Is Subject to the Laws of Taxation and Inheritance and Which May Be Freely Alienated.**

The Alaska coal-land laws contain no limitation or restriction upon alienation. No restriction upon the freedom of sale and purchase can be implied.

If such rights are limited, it is because the limitations are contained in the statute. These principles are well illustrated in the following cases:

The opinion of Mr. Justice Davis in *Meyers v. Croft*, (13 Wall. 291) has been much quoted and many times followed upon the announced broad principle of absolute freedom of sale of inchoate rights and interests in public lands, *unless expressly prohibited by statute*. In speaking of the interdiction in the pre-emption statute upon alienation after entry and before patent, it is said (p. 296):

“The inquiry is, what did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and independently of the legislation of Congress assignable.”

And the Court held (p. 297) that notwithstanding the strict letter of the Act, prohibiting sale before patent,

“The object of Congress was attained when the pre-emptor went, with clean hands, to the land office and proved up his right and paid the Government for his land;”

and that the entrymen might therefore sell after final proof and before the patent issued.

By Section 2 of the timber and stone act (20 Stat. 89) the applicant was required, when filing his application to purchase the land, to swear

“\* \* that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself.”

By the 3rd section of the act, when completing his entry, it was provided that:

“\* \* the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied, and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and \* \*

“Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.”

The regulations prescribed by the General Land Office, with respect to final proof and entry, contained the following:

"The accuracy of affiant's information and the *bona fides* of the entry must be tested by close and sufficient oral examination. The register and receiver will especially direct such examination to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure, in whole or in part, to the benefit of any person or persons except himself. They will certify to the fact of such oral examination, its sufficiency, and his satisfaction therewith." (207 U. S., p. 457.)

In *Williamson v. United States*, 207 U. S. 425 (1908), the defendants were under an indictment for conspiracy to suborn various entrymen to commit perjury in relation to declarations to be made under the timber and stone act as to the purpose for which they desired to acquire the land, etc. It appeared in evidence that the entrymen had, between the times of filing their original applications to purchase and the times of making their final proofs, agreed to sell the land to the defendants. This Court held, on review, that as the act contained no prohibition against alienation *after* the original declaration and *before* final proof, the entrymen were free to sell, and so notwithstanding the rule of the General Land Office to the contrary, with respect to final proof of the



*bona fides* of the applicants, Mr. Justice White remarking, in the course of the opinion (p. 460):

"Indeed, we cannot perceive how, under the statute, if an applicant has in good faith complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right. These conclusions are directly sustained by a recent ruling in *Adams v. Church*, 193 U. S. 510, construing the timber culture act."

A prohibition against assignment will not be extended by construction.

In *Adams v. Church*, 193 U. S. 510 (1904), in construing similar provisions in the timber culture act (20 Stat. 113), Mr. Justice Day, speaking for the Court, said (pp. 516-17):

"If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. *Myers v. Croft*, 13 Wall. 291.

"To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision

a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject."

In *Anderson v. Carkins*, 135 U. S. 483 (1890), the right of alienation of a homestead under section 2291 R. S., before final entry, was denied because the act requires the applicant, on final proof, to make affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight.

This distinction between the homestead law and the timber culture act is emphasized in *Adams v. Church*, *supra*, p. 515.

In *Webster v. Luther*, 163 U. S. 331 (1896), the Court had under consideration Section 2306 R. S., reading as follows:

"Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land, as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

This section was passed March 3rd, 1873 (17 Stat. 605), as an amendment to the Soldiers' and Sailors' Homestead Act of 1872, which was amendatory to the general homestead law of 1862. The power of the beneficiaries to assign their additional

homestead rights *before entry* was involved. In the instant case, the "additional right" had been assigned seven years before the application for entry had been made. It was held that the additional homestead rights provided by section 2306 were not burdened with the prohibition against alienation contained in the general homestead law.

Mr. Justice Harlan, speaking for the Court, adopted and approved the following statement from the Supreme Court of Minnesota (p. 339):

"There being nothing in the terms of the section requiring the things specified in the act of 1862, to-wit, the making of proofs, affidavits, etc., is there anything in the policy of the government in respect to the subject-matters of the various acts referred to which raises the presumption that Congress intended any of the requirements of the act of 1862 to apply to the 'additional right?' or intended the feature of inalienability impressed on the homestead entered under the act of 1862, or the first section of the act of 1872, should attach to the 'additional right?'" And page 340:

"There is no reason to suppose that it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee. After the right was conferred it was immaterial to the government whether the original donee should continue to hold it, or should transfer it to another."

He also quoted (p. 341) with approval from a

decision upon the same point by Judge Sanborn in *Barnes v. Poirier*, 64 Fed. Rep. p. 18:

“ ‘The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the original homestead, and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leaves us without doubt that the assignment before entry of the right to this additional land granted by section 2306 of the Revised Statutes contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns.’ ”

Judge Sanborn also said in the *Barnes* case (64 Fed. p. 15):

“ ‘Restraints upon alienation are not favored by the law. The modern rule is that one may do what

he will with his own, unless prohibited by a positive statute, or restrained by a manifest public policy. It goes without saying that the assignment of this right before entry must be sustained unless it is thus clearly prohibited. The right of entry carries with it the right of immediate sale and disposition, in the absence of such a prohibition. It is not contended that there is any statutory prohibition of such an assignment. The contention is that the right to this additional land under section 2306 is a part of the original homestead right granted by sections 2289, 2291, 2304, 2305, Rev. St., and that, because the assignment of that right before the entry of the land was contrary to public policy and void, the assignment of the right of entry, under section 2306 is so. A careful comparison of these sections utterly fails to sustain this proposition."

The Court also laid down the rule, in *Webster v. Luther (supra)*, p. 342, that the General Land Office cannot, by its regulations (prohibiting alienation) defeat the obvious purposes of the statutes. This doctrine was reinforced and emphasized in *Williamson v. United States (supra)*, 207 U. S., p. 462.

In *Mullen v. Wine*, 26 Fed. Rep. 206 (1886), Mr. Justice Brewer, then Circuit Judge, rendered an opinion upon the assignability of the Soldiers' and Sailors' Additional Homestead Rights, in which he said (p. 207):

"Now, this right to enter and locate 80 acres was a thing of value,—something which enlarged the estate of the minors,—was property. It was personal property, going with them where they

went; could be exercised and enjoyed anywhere; did not descend to the heir; was not attached to any particular tract of land; was therefore neither permanent, fixed, nor immovable. It was a mere right of selection and taking. Like all property, it was the subject of sale. The right to sell property need not in terms be granted; it exists if it is not in terms withheld. To preserve the Indian's title an express restriction is inserted in the patent. The same or something equivalent is always necessary to stay the power of disposal which attends the ownership of property. When this right has been exercised, the location and entry made, who would doubt the right to sell the land? Yet why should the right to sell exist after entry and not before? Congress has placed no restriction,—who may?"

In *Thredgill v. Pintard*, 12 How. 24 (1851), a case much cited, the court recognized the right of assignment of a location under the earlier pre-emption laws which contained no restrictive provisions upon alienation.

In *Pereles v. Weil*, U. S. Marshal, 157 Fed. Rep. 419, Judge Sanborn approved the entries of coal lands made in Colorado, under the general Coal-Land laws by the defendants, in their individual capacity, but with the avowed purpose and intent of securing in the aggregate some 9300 acres of coal land, oil land, and mineral land; and turning the same over to a corporation which they had organized, in exchange for the capital stock of the company. In the course of a most able opinion, the Court used the following language (p. 424):



"On the other hand, if the owner of 160 acres of coal land, holding by valid entry, purchases more coal land from another, by ordinary conveyance, without attempting to make any further entry either by himself or his agent, he not only violates no policy and commits no fraud, but simply takes the benefit of the important and favored right of free and unrestricted alienation; a right which has been nowhere more emphatically encouraged than by the courts of the United States in public land cases."

In *Fackler v. Ford*, 24 How. 322 (1860), a contract to convey lands after they should be obtained from the United States, was decreed to be specifically enforced, notwithstanding the act of March 31, 1830, denouncing contracts between persons desiring to bid at public sales intended to suppress competition.

In *Beley v. Naphtaly*, 169 U. S. 353 (1898), the Court had under consideration the construction of the Mexican land grant statutes. Mr. Justice Peckham remarked, in the course of the opinion (p. 363):

"It is also objected that even if Millett were adjudged a purchaser in good faith from a Mexican grantee, he could not convey to another his right under the statute of 1866, but that it was a mere personal privilege which he might exercise to purchase the land at the minimum price established by law. We think that a person who was within the statute and who had the right to purchase land as provided therein, was not confined to the actual purchase himself, but that he could assign or convey such right, and that his grantee or assignee,

immediate or remote, could, so far as this point is concerned, exercise the same right of purchase which he had before he conveyed or assigned."

He then cited *Thredgill v. Pintard*, 12 How. 24, and *Webster v. Luther*, 163 U. S. 331, and proceeds (p. 363):

"In the above cases the general rule of law which discourages all restraints upon alienation was recognized, and the assignment of a right before entry was held valid, one of the reasons for such holding being that there was no restriction against such assignment contained in the act creating the right. Nor is any such restriction to be found in the act of 1866."

It may therefore be asserted that unless the statute which grants the right of entry, by its terms inhibits the sale or alienation of the subject of the entry, or the personal privilege itself of making the location and entering a part of the public domain, the freedom of trade in such rights of property, which is given to the citizen in other departments of life, always obtains as a valuable part of the grant.

Nor can a prohibition in another act *in pari materia* be read into an act in which no prohibition is invested by Congress.

In *French v. Spencer*, 21 How. 228 (1858), the Court was considering the bounty-land act of 1816. It was contended by counsel that inasmuch as the

bounty-land act of 1812 contained a prohibition against assignment before patent, that the two acts should be construed *in pari materia*, and that the prohibition against alienation was, therefore, a part of the act of 1816; but the Court refused the construction by reference, Mr. Justice Catron, speaking for the Court, saying (p. 238):

“The act of March 5, 1816, has no reference to, or necessary connection with, any other bounty-land act; it is plain on its face, and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on part of the judicial tribunals legislative power. It is, that where the Legislature makes a plain provision, without making any exception, the courts can make none.”

The same rule was announced by the same Court in *Maxwell v. Moore*, 22 How. 185 (1859), where Mr. Justice Catron also said (p. 191):

“It is insisted that the acts of 1812 and 1826 are on the same subject, must stand together as one provision, and the last act carry with it the prohibition found in the first. We are of the opinion that the acts have no necessary connection; that there was no good reason why the soldier who removed to Arkansas, and inspected his tract of land, then patented, and alienable, should not contract to convey the tract he might get in exchange.”

Adverting now to the Alaska coal-land law of 1904, we find not only the absence of all restrictions on alienation, but the positive invitation to sell, and as well a promise by the Government to recognize

the purchaser, and award to him a patent to the located lands purchased. The words in section 2, "the locator or his assigns," certainly imply the unrestricted right to assign.

It being admitted that the locator may assign, it follows that there may be assignees, as it is not less lawful to buy than to sell.

In *United States v. Budd*, 144 U. S. 154 (1892), speaking of the timber and stone act, Mr. Justice Brewer said (pp. 162-163):

"It appears that Montgomery purchased quite a number of tracts of timber lands in that vicinity, some ten thousand acres, as claimed by one of the witnesses; that the title to twenty-one of these tracts was obtained from the government within a year, by various parties, but with the same two witnesses to the application in each case; that the purchases by Montgomery were made shortly after the payment to the government, and in two instances a day or so before such payment; that these various deeds recite only a nominal consideration of one dollar; that Budd and Montgomery were residents of the same city, Portland, Oregon; that one of the two witnesses to these applications was examining the lands in that vicinity and reporting to Montgomery; and that the patentee, Budd, years after his conveyance to Montgomery, stated to a government agent who was making inquiry into the transaction that he still held the land and had not sold it, but that it was 'in soak.' But surely this amounts to little or nothing. It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate, and implies or suggests no wrong. The

act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law.”

If one may lawfully purchase 10,000 acres of timber land acquired under the timber and stone act, which limits each purchase from the government to 160 acres and denounces a prior agreement with respect thereto, why may he not purchase 6,000 acres of coal land under the 1904 Alaska coal act, which contains no restrictions?

We have seen that the freedom of sale and purchase is unrestricted unless prohibited by the law, that the Alaska coal-land act carries no such prohibition, and that no restrictions can be read into it. Wherein, therefore, is the restraint against

alienation of the *right to locate* coal lands on unsurveyed lands in Alaska?

The right to locate is granted by the act of Congress to every citizen and to every person who has declared his intention to become a citizen. Such right to locate is a valuable right—a species of property. Why may it not be assigned as freely before as after it has been used, like the soldiers' and sailors' "additional rights?" Or, to state the point more tersely, why may not one who is qualified to locate coal lands in Alaska, under the 1904 act, as lawfully agree to assign his claim before he enters it as after? If one may assign his location immediately upon staking the ground, may he not agree, in advance, to do that which the law invites him to do? How can it be unlawful to promise to do a lawful act?

Under the timber and stone act and the timber culture act, the restraint upon contract prior to declaration is found in the text of the law authorizing the entry; such prior contracts of alienation have accordingly and properly been denounced by courts, but perfect freedom of sale at any time after the initial application and before the final entry has been as liberally sanctioned, because the laws did not forbid.

The Alaska coal law does not forbid, but rather encourages transfers. How, then, can a person be



guilty of a crime for agreeing in advance to do that which the law invites him to do?

If the entrymen are not guilty of the violation of any law, the defendants cannot be guilty of criminal conspiracy to defraud the United States, by inducing the entrymen to do that which they had the lawful right to do.

In *Lamb v. Davenport*, 18 Wall. 307, the Court had under consideration the validity of a transfer of mere promissory rights to public lands in Oregon, made before the passage of the Oregon Donation Act, and Mr. Justice Miller made the following observations (p. 314):

“The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress had imposed restrictions on such contracts.”

And in *Stark v. Starr*, 94 U. S. 477, it was held that a purchaser by such a contract acquired an equitable right to the land, which would be enforced when the legal title was obtained.

In construing the townsite act of March 2,

1867, Mr. Justice Swayne said, in *Hussey v. Smith*, 99 U. S. (pp. 22-23):

“Smith had an equitable interest in the premises in controversy which he could sell and convey.  
\* \* \* \* \* The act does not prohibit a sale, but is silent upon the subject.”

In *Irvine v. Marshall*, 20 How. 558, the question arose over the policy and power of the Federal Courts to enforce a resulting trust in favor of the principal against an agent who had purchased, in 1854, government land at public auction with money furnished by the principal for the purpose, in pursuance of an understanding between the parties had prior to the sale. The Supreme Court decreed that the trust could be enforced. In the course of the opinion, clearly sustaining the right of prior agreement, Mr. Justice Daniel said (p. 562):

“If a person desirous of purchasing shall depute an agent to attend a sale of public lands, and if at such sale payment be made by the agent with the funds of his principal, and both agent and principal shall present themselves at the General Land Office, and mutually request a patent to be issued to the true owner, can it possibly be thought within the competency of a Territorial Legislature, either upon the suggestion, or upon proof of the fact, that a certificate of purchase was given to the agent in his own name, to interpose, and say to the Federal Government, *you shall not make a title to this person whom you know, upon the acknowledgment of all concerned, is the true and bona fide pur-*

*chaser of the land, and if you do we will vacate that title?* Is it not for the increase of the revenue that the sales of the public lands should be as extensive as possible, and is it not obviously promotive of this end, that persons who can attend and bid at those sales by agent or attorney only, as well as those who can attend them in person, should have the power to purchase; and would not an inhibition of this privilege operate to restrict the sales of the public lands, and thereby injure the revenue of the Government?"

Mining claims have always been freely bought and sold.

In *Smelting Co. v. Kemp*, 104 U. S. 636, Mr. Justice Field, in affirming the assignability of placer claims, used the following language (pp. 650-651):

"Placer claims first became the subject of regulation by the mining act of July 9, 1870, c. 235 (16 Stat. 217), which provided that patents for them might be issued under like circumstances and conditions as for vein or lode claims, and that persons having contiguous claims of *any size* might make joint entry thereof. But it also provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons. The mining act of May 10, 1872, c. 152 (17 id. 91), declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer claims, and they are re-enacted in the Revised Statutes. Secs. 2330, 2331. A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the

number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. In the mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining claim. Sec. 13 of the act of 1870 declares that where a person or association or *their grantors* have held and worked claims for a period equal to the time prescribed by the Statute of Limitations of the State or Territory where the same is situated, evidence of such possession and working shall be sufficient to establish the right to a patent. Sec. 5 of the act of 1872, rendering a mining claim subject to relocation where certain conditions of improvement or expenditure have not been made, has a proviso that the original locators, '*their heirs, assigns, or legal representatives*, have not resumed work upon the claim after such failure and before such location.' These provisions are of themselves conclusive that the locator's interest in a mining grant is salable and transferable, even were there any doubt on the subject, in the absence of express statutory prohibition. Those of the act of 1870 are also conclusive of the right of the purchaser of claims to a patent, for it is with reference to it that the derivative right by purchase or assignment is mentioned. Rev. Stat., secs. 2332, 2334."

So we say, to adapt Justice Field's logic to the Alaska coal-land act of 1904:

"A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent."

In *Forbes v. Gracey*, 94 U. S. 762 (1876), in which the power of the state to tax mining claims

was upheld, Mr. Justice Miller, in delivering the opinion of the Court, said (p. 767):

“Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific Coast States. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by well-defined code or codes of law, and are recognized by the States and the Federal Government. This claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States.”

In *Billings v. Aspen Mining & Smelting Co.*, 51 Fed. 338, the Circuit Court of Appeals, for the eighth circuit, decided that even an alien might inherit a located mine. Mr. Justice Shiras, then District Judge, speaking for the Court, referred (p. 342) first to the exploration statute (Sec. 2319, R. S.), as the general authority under which the mine had been located, and then said (p. 344):

“At the time of his death he (the locator) held and possessed a right and title indefeasible as against all the world, save the sovereign, and defeasible by the latter only by direct proceedings for that purpose. The title and interest thus possessed by Wood passed, at his death, to those who by the laws of the State of Colorado were capable of inheriting property in that state.”

Sec. 3 of the Alaska act provides for quieting the title to located land—coal claims—at the suit of adverse claimants in a court of equity, before payment or patent; and directs that “such patent shall

then be issued in conformity with the final decree of such court therein." So it seems that there must be some *title in the located land* to be quieted, otherwise it would appear that Congress sent the contestants to Court for no purpose. It is not here contended that such title is indefeasible against the United States before the applicant has earned his patent by paying the purchase price, as locations are always made subject to payment, within the time limited by the act; but it is insisted that the title referred to in the act, which may be quieted in a court of competent jurisdiction, is an interest and estate in the land itself, a vendible title, such an one as may be sold and alienated as freely as any other species of property known to the law.

In *United States v. Biggs*, 211 U. S., 507, in considering an indictment charging conspiracy under section 5440, in procuring entrymen, under the timber and stone act, to contract to sell their claims after they had made their initial applications, and *before* final proof and payment, it further appearing that the contracts were made with a corporation which was to furnish the money to pay for the land, and that the corporation was thereby procuring more land than the act permitted to be entered by the corporation, Chief Justice White, after referring to the rulings in favor of alienation as announced in *Adams v. Church* and in *William-*



*son v. United States*, used the following language (pp. 521-522):

“It is insisted by the Government that, however conclusive may be this ruling as to the power of the applicant to sell after application and to perfect his entry for the purpose of enabling him to perform such contract, such ruling does not conclude the contention that a conspiracy formed to induce an entryman who has made his application to purchase subsequently to agree to convey his interest in the land would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference. The effect of the ruling in the *Williamson* case was to hold that the prohibition of the statute only applied to the period of original application, and ceased to restrain the power of the entryman to sell to another and perfect his entry for the purpose of transferring the title after patent. This being concluded by the decision in the *Williamson* case, the distinction now sought to be made comes to this, that it is unlawful under the statute to conspire to have that done which the statute did not prohibit, and, on the contrary, by implication recognized could be lawfully done without prejudice or injury to the United States in any manner whatever. This also serves to demonstrate that no error was committed by the Court below in holding that under Sec. 5440, Rev. Stat., the acts charged in the indictment could not possibly have constituted a defrauding of the United States in any manner or for any purpose within the intendment of that section.”

The *Biggs* case is exactly in point. It leaves nothing more to be said to confirm the unrestricted right of alienation and the freedom of locator and purchaser to contract at any time, when not re-

strained by the statute. And as no restraint can be found in the Alaska coal-land act, the Alaska coal-land locators may contract to sell their claims in advance of the time of locating as freely as afterwards.

This being true, it cannot be made criminal to conspire to induce men to do that which the law permits them to do.

**A FAIR AND REASONABLE INTERPRETATION OF THE  
ALASKA STATUTE EXCLUDES THE IDEA OF  
CRIMINAL INTENT TO VIOLATE ITS  
PROVISIONS.**

**The General Coal-Land Laws Do Not Apply—Land Office  
Rules Cannot Change the Law.**

The Government will seek to have the indictment upheld upon the theory that the general coal-land laws (R. S., 2347-2352) are to be read into the Alaska act of 1904 by reference, by virtue of section 4 of the latter act; and as so imported, both sets of laws are to be read together as one act, and construed *in pari materia*.

It will then be contended by plaintiff in error that inasmuch as sec. 2347, R. S., limits the quantity that may be taken by one person to 160 acres, and the quantity that may be taken by an associa-

tion to 320 acres of raw land; and that sec. 2348 limits the area that may be taken by an association of not less than four persons to 640 acres, when a mine has been opened up and improved at a cost of not less than \$5,000; and as sec. 2350, R. S., limits the right of each person or association to one entry; and as the defendants were endeavoring to secure the title in one corporation or association to 40 coal claims, embracing 6087 acres in the aggregate, they were necessarily guilty of a conspiracy to defraud the Government by violating the provisions of secs. 2347, 2348, and 2350 of the general coal-land laws so imported into the Alaska law.

We have already attempted to show (*supra*, pp. 26-42) that the legislation in question is not reasonably susceptible of any such *inter-construction*; that the two laws are entirely separate and distinct (except as to the one matter of citizenship of the locators); that they operate exclusively upon entirely different and distinct classes of offered public lands; that they are wholly inconsistent with each other and cannot be read together as covering one subject. And we now most earnestly submit to the serious consideration of this Court that the Government's attempt to construe these two sets of laws together so as to make criminals out of its citizens who have, in good faith, followed the letter and spirit of the Alaska statute as it stands and as it has been construed by the court below, should

not find lodgment in any court of justice. Should it be found that the lower court was in error in its construction of the law, there is at least enough doubt in the matter to repel the idea of criminal intent to defraud the Government, when the only facts alleged show a strict compliance with the Alaska act standing alone.

But suppose the two statutes are to be construed *in pari materia* and read as one act, then what do we find? The original coal-land act containing the general laws, in their present form, with the important exceptions to be presently noted, was approved on March 3, 1873 (17 Stat., 607-608). The act contained six sections, corresponding with secs. 2347-2352, R. S., inclusive.

Under the revision of December 1, 1873, of the general and permanent statutes of the United States, the coal-land act was re-written, revised, and brought in under Title XXXII., chapter 6, relating to mineral lands and mining resources.

By a comparison of the original and revised sections, as shown below, the changes made in the revision will be apparent, and they are extremely important as bearing upon the interpretation contended for by the Government, as will be explained:

(The changes are shown underscored.)

COAL LAND ACT,  
March 3, 1873. (17  
Stat., 607-608.)

That any person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than

COAL LAND LAWS  
Contained in the RE-  
VISED STATUTES  
of December 1, 1873.

Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such associa-

ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Section 2. That any person or association of persons severally qualified as above, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the foregoing provisions, of the mines so opened and improved: Provided, That when any association of not less

than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: Provided, That when any association of not less



than four persons, severally qualified as in section one of this act, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Section 3. That all claims under section two of this act must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor: Provided, That when the township plat is not on file at the date of such improvement, filing must be

than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days

made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the passage of this act, sixty days from the expiration of said three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this act shall be allowed until the expiration of six months from the date hereof.

from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Section 4. That this act shall be held to authorize only one entry by the same person or association of persons under its provisions; and no association of persons, any member of which shall

Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have

have taken the benefit of this act either as an individual or as a member of any other association shall enter or hold any other lands under the provisions of this act; and no member of any association which shall have taken the benefit of this act shall enter or hold any other lands under its provisions; and all persons claiming under section two hereof, shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Section 5. That in case of conflicting claims upon lands where the improvements shall be hereafter commenced, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made at the date of the passage of this act, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties; and the commissioner of the general land-office shall be, and is hereby, authorized to issue all needful rules and regulations for carrying into effect the provisions of this act.

Sec. 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into

effect the provisions of this and the four preceding sections.

Section 6. That nothing in this act shall be construed to destroy or impair any rights which may have attached prior to its passage, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

Sec. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

It will be observed from the above comparison that some twenty changes were made in the revision.

Those important to be here noted relate particularly to the changes in sec. 4 of the original act, as brought forward in sec. 2350, with reference to the limitation to one entry. The original sec. 4 read (commencing line 1):

"That *this act* shall be held to authorize only one entry by the same person or association of persons under *its* provisions."

Sec. 2350, R. S., reads:

*"The three preceding sections (2347-2348-2349)*

shall be held to authorize only one entry by the same person or association of persons."

Other changes were made to confine the limitations to "The three preceding sections," rather than to apply them to the act as a whole.

Now, in order to make the limitation to one entry effective in the Alaska act, plaintiff in error is forced into the strained and untenable position of contending that the 1904 Alaska statute must be read with the original (not the revised) section of the general laws, because sec. 2350 limits the restriction upon plural entries to those claiming under "The three preceding sections" of the Revised Statutes; while sec. 4 of the original act applied the limitation to the entire act; and the only way that the limitations can be made to apply to the Alaska law, is to import into it the restriction contained in sec. 4 of the act of March 3, 1873, by now reading those two acts together.

If we read the Alaska act and secs. 2347-2352 of the Revised Statutes together as one entire statute, then the restriction cannot apply to unsurveyed lands in Alaska, unless the first three sections of the 1904 statute are interpolated between secs. 2349 and 2350, R. S.; and if so interpolated, then the restrictions under the present "three preceding sections," R. S., would be removed—a result which is altogether ridiculous.



In order to hold defendants guilty of a conspiracy to acquire more coal land in Alaska than is permitted by the laws applicable to the acquisition of such lands, learned counsel for the Government would have this Court depart so far from the accepted canons of interpretation as to import into the Alaska statute, by reference, the general coal-land laws as they exist under the revision; and then further to amend the general laws by another reference to the text of the obsolete law of March 3, 1873—that is to say, a reference by a reference to a dead law.

This cannot be done. The act of March 3, 1873, was repealed by the repealing section of the revision, and secs. 2347-2352 were then put into force in lieu thereof.

To quote (5596, R. S.):

“All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof.”

Not only was the old law supplanted and superseded by the revision, but under the act of June 20, 1874, the printed statutes were made “legal evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several states and territories.”

(18 Stat., 113.)

This same question was squarely before the Court in *United States v. Bowen*, 100 U. S. 508. The controversy was between the Government and one of its pensioners—he being an inmate of the Soldiers' Home.

The act of 1859 (11 Stat. 434), by sec. 6, provided that:

“all pensioners, on account of wounds or disability incurred in the military service shall transfer and surrender their pensions to the institution for and during the time they may remain therein and voluntarily continue to receive its benefits.”

Sec. 4820, R. S., provides:

“The fact that one to whom a pension has been granted for wounds or disability received in the military service has not contributed to the funds of the Soldiers' Home shall not preclude him from admission thereto. But all *such* pensioners shall surrender their pensions to the Soldiers' Home during the time they remain therein and voluntarily receive its benefits.”

The Attorney-General admitted that the whole controversy arose from interpolating in the Revised Statutes the word “such” between “all” and “pensioners” in the former act, and insisted that the revisers only attempted to collate, and that Congress did not mean to change the law as it stood; and that recourse could be had to the antecedent law to ascer-

tain the true meaning of the statute as revised; but this Court, speaking through Mr. Justice Miller, said in answer (p. 513):

“But, as the revision embraces that act as well as all others on the subject, it is, by the express language of the repealing clause, sec. 5596, no longer in force. Counsel for government, admitting that it is no longer in force, independently of the section of the revision which we are called on to construe, insist that a resort may be had to the law which was the subject of revision, to interpret anything left in doubt by the language of the revisers.

“This principle is undoubtedly sound; and, where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.”

There can be no doubt that the language, “the three preceding sections,” of sec. 2350, is so clear and plain as to require no construction. It cannot refer to any other act of Congress then existing or to be thereafter passed; and if the Government insists on reading the general coal-land laws of the United States into the Alaska act, the Revised Statutes must be taken—not as the law was but as it now stands—as the legal evidence of what the

law is. That the Government is attempting to sustain the indictment in this case by predicating the offense charged upon a violation of the original repealed coal-land act of March 3, 1873, rather than of the Revised Statutes, is manifest from its fourth, fifth, sixth, and thirteenth assignments of errors; and it is respectfully submitted that said assignments should, therefore, be disregarded. (R. 47-49.)

The Alaska statute of 1904 (on a violation of which the indictment is really bottomed) does not in terms prohibit plural entries—that is to say, the entering of more than one coal claim by the same person—but an extended discussion of this point is really beside the main issue, as it is admitted in the indictment that each entryman was seeking to acquire but one claim of not over 160 acres, and that the entrymen were all qualified under the law to locate coal claims in Alaska. No question of plural entries is suggested in this case. The only vice alleged by the Government rests in an assumed antecedent agreement of the several entrymen to sell to a common purchaser.

As has been seen, sec. 2350, R. S., does limit one person to one entry; therefore, if we find that sec. 2350 is to be imported into the Alaska act, its only effect there is to limit each locator to one entry, and this is literally all that is charged. We assert this boldly because the "entry" under the Alaska statute is initiated and concluded by the "location,"

under the provisions of sec. 1 of the act; and it cannot be contended that any person involved in the transactions referred to in the indictment in the case at bar ever contemplated that more than one entry should be made by one qualified person; and so there could be no violation of sec. 2350 respecting plural entries, unless it would be violated by an anterior agreement to convey after patent. This we have shown is not prohibited, but is expressly invited by sec. 2 of the Alaska act, which certainly contains the latest expression of Congress, and therefore controls.

The real point in the case of the Government does not relate to the entries, but rather to what the entrymen intended to do with their claims after entering them. And here we may very respectfully suggest that, under the law, this is not a legitimate inquiry for the Government, or its Land Department, to pursue; because Congress has placed no restrictions upon the power and authority of the entrymen to alienate their claims. And as Congress has not imposed a restriction, who may? Certainly not the Land Department, whose function is to administer, not to legislate.

The general coal-land laws (secs. 2347-2352, R. S.) do not, in terms, prohibit the making of an entry by one person (who has not already exhausted his right to enter coal land) in his own name, and ostensibly for himself but really for another qualified

person. That prohibition is by inference, by the Land Department, imported into the United States coal-land statutes by rules and regulations, because the Department thought it essential in order to make effective the prohibition against plural entries—reasoning that plural entries could not be effectively prohibited unless the applicant should be required to make oath that he makes the entry for himself and not for another.

That the Department of the Interior has, by its arbitrary rules, attempted to circumvent alienation in Alaska before patent, and to restrict the ultimate purchaser to a single entry, by requiring him to make oath that he applies for patent

*“in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever,”*

is evidenced by the revised circular on coal-land laws and regulations thereunder, issued by the General Land Office on April 12, 1907, in which will be found (page 18) the required affidavit to accompany the application for patent for Alaska lands, containing the above.

XXXV Land Decisions, p. 679.

Notwithstanding that said circular was promulgated nearly two years after the formation of the alleged conspiracy, we find in the above rules the foundation for the charge in the indictment that



defendants were conspiring to violate the rules of the Department. The said Land Office rule is, in all its essentials, upon a par with that certain other rule promulgated by the Department with respect to the proof required to be submitted by the applicant to purchase lands under the timber and stone act of June 3, 1878 (20 Stat., 89), which rule was treated as follows by the present Chief Justice of this Court, in announcing the opinion in *Williamson v. United States*, 207 U. S. 425 (p. 461-462):

“It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of Congress must be considered as having expressly excluded in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in *Adams v. Church*, *supra*, at page 517: ‘To sustain the contention \* \* \* would be to incorporate \* \* \* a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.’ True it is that in the concluding portion of §3 of the timber and stone act it is provided that ‘effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.’ But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations

destructive of rights which Congress had conferred. As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied."

It should also be noted in this connection that the early coal-land rules promulgated by the Department after the passage of the Alaska act, contained no such form of affidavit. We quote from the Circular of Regulations, concerning the location and patenting of coal lands in the District of Alaska, approved July 18th, 1904 (XXXIII Land Decs., 114-119). By said rules and regulations containing its first construction of the act of 1904, the Department of the Interior held, under section 1, that:

"Persons or associations of persons locating coal lands in the District of Alaska under this provision of the act are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States, and the requirements in this particular are to be found in the coal-land circular approved July 31, 1882 (1 L. D., 687; paragraphs 30 and 31 amended, 32 L. D., 382)."

(Ib. p. 114.)

It will be observed that no limitations are mentioned or referred to. However, in the revised rules promulgated by the Department on April 12th, 1907 (nearly two years after the organization of the alleged conspiracy), there was added to the foregoing, after the words "general coal-land laws of the United States," the following:

*"And are subject to the same limitations."*

Circular of the General Land Office, Rule 1,  
p. 13, XXXV Land Decs., p. 674.

No limitations were originally found in the act or suggested in the elaborate set of instructions first promulgated by the Department.

XXXIII Land Decs., pp. 114-119.

The public had the right to assume the absence of limitations, both from the reading of the statute and from the construction placed upon it by the Land Department. Most certainly an *ex post facto* rule of the Department cannot bind these defendants, even conceding (which we do not) that the latter construction is correct.

If the law is so doubtful in its meaning, with respect to its relation to the general coal-land laws, that the Land Department of the United States, whose duty it was to construe it first, could find no relation in the 1904 act except as to the one mat-

ter of citizenship—which is always admitted—the defendants ought not to be charged with criminal intent in 1905 to defraud the Government by reading and following the law as it had been read and followed by the Government's Land Office.

Assignments of locations were, however, expressly recognized by the Department.

“By the second section of the act the locator or his assigns is allowed three years from the date of filing the notice prescribed in the first section of the act within which to file an application with the local land officers for a patent for the land claimed. It will thus be seen that persons or associations of persons claiming coal lands in that district at the date of the passage of the act have four years from location within which to present their applications to purchase the same, and persons or associations of persons locating thereafter have the same period of time within which they may apply for patent; and patents may be issued to the locators or their assigns who are citizens of the United States.”

XXXIII Land Decs., p. 115.

Assignments of preference rights, under the general coal-land laws, were also then expressly recognized, as indeed they had always been until April 12th, 1907. The early coal-land circular referred to above, which was approved by Secretary Teller on July 31st, 1882, contained the following rule (p. 9):

"37. Assignments of the right to purchase will be recognized when properly executed. Proof and payment must be made, however, within the prescribed period, which dates from the first day of the possession of the assignor who initiated the claim."

1 Land Decs., p. 693.

Without any change in the law, and after assignments of preference rights had been constantly and consistently recognized and approved by the Department of the Interior for thirty-four years, the Department suddenly reversed itself, and attempted to set aside the established law, by declaring in its circular of April 12th, 1907, that:

"Assignment of a preference right of entry under section 2348, Revised Statutes, will not hereafter be recognized."

Rule 5, p. 5, Circular of the General Land Office, April 12th, 1907. XXXV Land Decs., p. 667.

It had long before (1894) been decided by Mr. Secretary Hoke Smith, that:

"There is no prohibition in the statute providing for coal entries, against the transfer of the preference right of entry, as in the pre-emption and homestead laws cited by counsel. (See sections 2347, 2348, 2349, 2350, 2351, and 2352, Revised Statutes.) This right is a valuable property right,

and independent of a statutory prohibition, may be assigned. (*Myers v. Croft*, 13 Wall. 291)."

McConnell Coal Land Entry, XVIII Land Decs., p. 415.

The Honorable Secretary also took occasion in that case to construe the word "benefit," as used in the Department rules, "benefit of one entry." He draws a clear distinction between the limitations imposed on those who file on the land and their assignees, concluding that the assignees are not limited to one entry.

To quote (addressing the Commissioner):

"Rule 9, of the Rules and Regulations (*supra*), provides *inter alia* that 'One person can have the benefit of one entry or filing only. He is disqualified by having made such entry or filing alone, or as a member of an association.'

"The first sentence of this paragraph is complete in itself, and taken alone, a strict construction would warrant the conclusion of your office in the judgment appealed from, waiving the question of its conflict with the statute on which it is based. But the following sentence of the paragraph quoted, is explanatory of the first, and shows conclusively that by a 'person' who has had the 'benefit of one entry,' is meant a person who has 'made such entry or filing,' and it is clear that by the 'benefit' referred to in the first sentence, the assumed benefit arising from the assignment of an entry or filing, was not contemplated. Indeed, if it were otherwise, the regulation itself would be in contravention of the statute, and therefore void."

(*Ib.*, p. 415.)



The crucial point involved in the McConnell case was whether an assignee might lawfully acquire by assignment to himself more than one preference right of purchase of coal lands of the United States. The Commissioner of the General Land Office had held (p. 415):

“That a person assigning a preference right of purchase or entry, cannot thereafter avail himself of a second assignment, or even make another coal filing.”

It was from this decision that the entryman appealed. His appeal was sustained and the Commissioner was reversed by the Secretary holding that a preference right is a valuable property right, and, independent of a statutory prohibition (which did not exist), might be assigned to and taken by one who had previously exhausted his right to enter coal lands—that is to say, if the reasoning is applied to the Alaska Act of 1904, the limitation to *one entry* applies to the original locator, but not to the assignee.

As was said by Mr. Justice Brewer in *United States v. Budd*, 144 U. S. 154 (p. 163):

“Montgomery (who purchased some 10,000 acres of land acquired under the timber and stone act) wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate, and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase

from the Government, or restrict in the slightest his power of alienation."

Neither does the Alaska coal-land act in any respect limit the dominion of the locator over his land, either before or after purchase from the Government; it invites him to assign his claim, and it does not prohibit nor condemn a prior agreement to assign.

Again adverting to the Land Office rules of July 18th, 1904, with respect to the Alaska law, we find:

"The notice of location and the application for patent should respectively, *so far as practicable*, in substance follow the forms prescribed in the coal-land circular of July 31, 1882, for declaratory statement and affidavit at time of purchase."

XXXIII Land Decs., p. 118.

"So far as practicable" means what it says, but it does not imply an affidavit "for my own benefit," in the sense that the Government is now using the term.

Referring to the provisions in section 3 of the Act, relating to the settlement of conflicting claims to locations, which are to be tried out in the courts, specific directions were given as follows:

"Section 3 provides for the assertion, by any person or association of persons, of an adverse claim, and requires that such adverse claim shall be

filed during the period of posting and publication, or within six months thereafter; that it shall be under oath and set forth the nature and extent thereof.

"An adverse claim may be verified by the oath of the adverse claimant or by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated, and, when verified by such agent or attorney in fact, he must distinctly swear that he is such agent or attorney in fact and accompany his affidavit by proof thereof. The adverse claimant should set forth fully the nature and extent of the interference or conflict by filing with his adverse claim a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance or duly certified copy thereof or an abstract of title from the office of the proper recorder should be furnished, or, if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof and amount paid, which facts will be supported by the affidavits of one or more witnesses, if any were present at the time; and if he claims as a locator he must file a duly certified copy of the location notice from the office of the proper recorder and his affidavit of continued ownership.

"Upon the filing of such adverse claim within the sixty days' period of posting and publication, or within six months thereafter, the party who files the adverse claim will be required, under the act, within sixty days after the filing of such adverse claim, to begin an action to quiet title in a court of competent jurisdiction within the district of Alaska."

(Ib., p. 117.)

We therefore note, in the original Department construction of the act, not only the utter absence of any of the restrictions which are implied by the indictment, but *a fortiori*, the very construction for which we are contending, i. e., the entire freedom of sale and alienation.

The revised rules expressly recognize powers of attorney and permit agents of locators to make final proof and payment.

Rule 27, XXXV Land Decs., p. 680.

In the Government's brief in *United States v. Hammers*, cause numbered 314, October term, 1910, decided in favor of the Government's contention, by this Court on May 15th, 1911 (31 Supreme Court Reporter 593), wherein the United States was contending for the principle of the right of assignment of initiatory entries made under the desert-land laws before the land was re-claimed or patent earned, counsel refers to as an authority, and quotes from the decision of Secretary Smith, *in re Kimble* (20 Land Decs., pp. 67-70-71) as follows (Brief for the United States, pp. 40-41):

"January 22, 1895, Secretary Smith, in reversing this requirement as to residence, and in holding that the word 'entry' in section 8 refers to the original filing, and not the final proof, said:  
'Congress contemplated an assignment of these desert land entries. The object of making this class of entries an exception to the unvarying rule

—except as to coal entries—can be readily understood. It is a matter of common knowledge that the effecting of a thorough or sufficient reclamation of desert lands in many instances involves the erection of permanent dams or reservoirs for the purpose of storing the water in the season when at flood, and the construction of canals for carrying the water many miles in length. From these canals lateral ditches must be run to the particular tracts to be irrigated. All this means permanent structures on exact grades to prevent washing; head-gates wherever the lateral ditches leave the main canal, constructed accurately to avoid waste, and so that the quantity of water required may be exactly measured. It is needless to say, perhaps, that all this requires a greater amount of capital oftentimes than can be furnished by the residents in the desert country. To induce those of our people who have the money to further these great enterprises, Congress wisely provided that these desert entries might be transferred under certain limitations and restrictions so that the assignees who have invested capital in the construction of these waterways might be assured of some compensation for their outlay. If the construction heretofore placed on this act is to prevail, that the assigns must also be resident citizens of the State or Territory where the land is located, it might defeat the object Congress had in view.' ”

Now, by the decision of Mr. Secretary Smith in the Kimble case, the Interior Department was committed to the following principles: 1st—The “entry” refers to the original filing, and not to the final proof. 2nd—Congress contemplated assignments of desert-land entries, the same as it did *coal-land entries* (evidently referring to the prefer-

ence right under the general law as an entry).  
3rd—A most important reason for allowing assignments of desert-land entries was found in the requirement for large investments of capital to put the reclamation projects through, and thus it was said:

“Congress wisely provided that these desert entries might be transferred under certain limitations and restrictions so that the assignees who have invested capital in the construction of these waterways might be assured of some compensation for their outlay.”

What more cogent reason need be suggested to emphasize the wisdom of Congress in providing that Alaska coal claims may be assigned under certain limitations and restrictions, to-wit: That the assignees must be full citizens—where the exigencies of the situation not only require far greater investments of capital to develop and equip the mines and to provide transportation facilities to unlock the coals and get them out of the mountainous wilderness where they are held, and into the channels of commerce and trade, but also involve greater business hazards in the undertaking.

If the reasoning of Secretary Smith, in support of his decision in the Kimble case, was good for the Government when it was seeking to maintain the assignability of desert-land entries before reclamation, it ought to be better and stronger to



sustain the assignability of Alaska coal-land entries. The manifest intention of Congress in the latter instance is even clearer than in the former, as will be seen by a comparison of the two acts.

In this connection, it is important to observe that sec. 7 of the desert-land act of March 3rd, 1891 (26 Stat. 1097) provides:

“But no person or association of persons shall hold, by assignment or otherwise prior to the issue of patent, more than 320 acres of such arid or desert lands,”

while in the Alaska coal-land act of 1904 there is no limitation upon the quantity of land that may be held by assignment. Had Congress intended to limit the quantity of Alaska coal land that might be held by assignment, it would have been as easy to express the limitation as in the desert-land act. . The absence of any limitation on quantity in the coal-land act indicates an intention not to limit the quantity which may be held by assignment.

Congress evidently assumed that the public interest and welfare would be sufficiently safe-guarded against monopoly or unduly large individual acquisition, by requiring, as a condition precedent to original location, that a mine or mines must be opened upon the lands sought to be entered.

We desire to again refer to the Government's brief in the *Hammers* case, in support of the general rule for which we are here contending, which is well stated on page 63 as follows:

"The true rule is that valuable property rights conferred by and earned from the Government are accompanied by the right of assignment, unless there be some statutory prohibition, or evident policy, to the contrary. The law discourages restraint on alienation."

**DEFENDANTS ARE ENTITLED TO THE BENEFIT OF A  
STRICT CONSTRUCTION OF THE LAW  
IN THEIR FAVOR.**

Penal statutes must be strictly construed, and, in their construction, resort shall not be had to other statutes to discover some supposed policy, or to read into the penal act something which is not there expressed. With this rule at all times in mind, one cannot have a criminal intent who keeps within the clear provisions of the act, notwithstanding land office or department rules to the contrary.

We take it as a settled principle in the criminal jurisprudence of this country that the defendants are as well entitled to the benefit of the doubt of the law as of the facts.

As bearing upon the question of intent in a prosecution, under an ambiguous statute, the court

in the case of *The Enterprise*, 1 Paine 32, 8 Fed. Cases, No. 4499, said (p. 734):

“Although ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature. If this be involved in considerable difficulty from the use of language not perfectly intelligible, unusual circumspection becomes necessary—especially if the consequences be so penal as scarcely to admit of aggravation. When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation.”

In *Harrison v. Vose*, 9 How. 372, the rule laid down in *The Enterprise* case was quoted with approval, and it was said (p. 379):

“In *The Enterprise*, 1 Paine, C. C. 32, it is said, that one shall not incur a penalty in cases of doubt, and courts should not extend a construction beyond what is clear in such cases.”

In *Bolles v. Outing Company*, 175 U. S. 262, Mr. Justice Brown said (p. 265):

“The statute, then, being penal, must be construed with such strictness as to carefully safe-

guard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice."

Where the intent is an essential ingredient of the crime, it may be charged in general terms and the existence of the intent becomes a question for the jury.

*Evans v. U. S.*, 153 U. S., p. 594.

But it is said in *U. S. v. Corbett*, 215 U. S., p. 244:

"It is, of course, to be conceded that where the facts charged to have been done with criminal intent are of such a nature that on the face of the indictment it must result as a matter of law that the criminal intent could not under any possible circumstances have existed, the charge of such intent, in general terms, would raise no issue of fact proper to go to a jury."

In an opinion by Mr. Justice Lurton, then sitting in the Sixth Circuit, it is said (p. 786):

"To extend a penal statute to a case not specifically described, the intention of the Legislature must be ascertained from the words of the act, and not made out by conjecture as to the purpose of the lawmaker or based upon probabilities."

*The Ben R.*, 134 Fed., p. 784 (C. C. A.).

"A penal statute which creates and denounces a new offense must be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified by such a statute. An act which is not clearly an offense by the express will of the legislative department of the government must not be made so after its commission by a broad construction adopted by the judiciary. The definition of the offense and the classification of the offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and unambiguous in its terms, the courts may not lawfully extend it, by construction, to a class of persons who are excluded from its effect by its terms, because, in their opinion, the acts of the latter are as mischievous as those of the class whose deeds the statute denounces."

*Field v. U. S.*, 137 Fed., p. 8.

In *United States v. Wiltberger*, 5 Wheaton, 76, opinion by Chief Justice Marshall, the indictment was for manslaughter on the high seas. The question was as to the jurisdiction of the Court for manslaughter on a river. It was held that the act must be construed strictly and the Chief Justice said (p. 95):

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."

The indictment in that case was founded on the 12th section of an act which read:

“And be it enacted, That if any seaman or other person shall commit manslaughter upon the high seas, \* \* \* \* \* such person \* \* \* \* shall be imprisoned,” etc.

The jurisdiction depended on the place of the commission of the crime. If on the high seas, there was jurisdiction, otherwise not. The allegation of the indictment was that the manslaughter was on an inland river in China. The Court said (p. 94):

“If the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense, the ‘high seas,’ if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country.”

In the 8th section of the same act, the words “high seas” appeared, together with the words “river, haven, basin, or bay.” The Court then said (p. 94):

“On the part of the United States, the jurisdiction of the Court is sustained, not so much on the extension of the words ‘high seas,’ as on that construction of the whole act, which would engraft the words of the 8th section, descriptive of the place in which murder may be committed, on the 12th section, which describes the place in which manslaughter may be committed. This transfer of the words of one section to the other, is, it has been

contended, in pursuance of the obvious intent of the legislature."

And again (p. 96) :

"The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.  
\* \* \* \* \*

"Having premised these general observations, the Court will proceed to the examination of the act, in order to determine whether the intention to incorporate the description of place contained in the 8th section, into the 12th, be so apparent as to justify the Court in so doing. It is contended, that throughout the act the description of one section is full, and is necessarily to be carried into all the other sections which relate to place, or to crime."

The Court then proceeds to analyze the whole act, which consists of a considerable number of sections, to see whether the limitations of one section can be read into the others. It may be stated also that the 8th section provided that murders committed on the high seas, and on rivers, etc., were punishable, while the 12th section provided that manslaughter committed on the high seas should be



punishable, but did not mention rivers. Then the Court says (p. 105):

“From this review of the examination made of the act at the bar, it appears that the argument chiefly relied on, to prove that the words of one section descriptive of the place ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place, which their words import. We admit that it is extremely improbable. But probability is not a guide which a Court, in construing a penal statute, can safely take. We can conceive no reason why other crimes which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this Court cannot enlarge the statute.”

Thereupon, the Court in a unanimous opinion, held that the crime was not within the jurisdiction of the United States. Here it will be noted that the crimes in question were parts of the same statute, occurring in different sections, and were much more kindred to each other than the entry of unsurveyed lands in Alaska is kindred to the entry of surveyed lands in Colorado.

*United States v. Reese*, 92 U. S., 214.

Opinion by Chief Justice Waite. The inspectors of election in Kentucky were indicted for refusing to receive the vote of a citizen of the United States of African descent. The statute in question provided in its first section that all citizens qualified

by law to vote, should be entitled to vote without distinction of race, color, etc.

The second section provided for the punishment of any officer charged with the duty of furnishing to citizens an opportunity to perform any act, who shall fail to give all citizens such equal opportunity.

The Court said (pp. 219-220):

"This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. \* \* \* \* \* Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, etc., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit, and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense, and thinks it is confined to a wrongful discrimination on account of race, etc., subjects himself to prosecu-

tion, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

And again, on page 221:

"The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large."

*United States v. Brewer*, 139 U. S. 278.

The United States statute on which the indictment in this case was found, had its jurisdiction in that it regulated the election of Congressmen. It provided in its terms that any one who should violate any provision of a United States election law, or of a state election law in any election in which Congressmen were concerned, should be punished. There was a series of enactments in the State of Tennessee which it was alleged the defendant violated; that by violating this state statute he thereby became amenable to the federal statute. In other words, the federal statute, in order to define

the crime which it created, *made reference to a state statute, and incorporated the latter by reference.*

The complaint in the indictment was that the defendant, an election officer, had removed the ballot-box from the election place before the votes were counted. This proceeding was not, in terms, prohibited by the Tennessee statute, but it was argued that it was *inferentially prohibited* because the Tennessee statute provided as follows:

"Section 1068: When the election is finished, the returning officer and judges shall, in the presence of such of the electors as may choose to attend, open the box and read aloud the names of the persons which shall appear in each ballot; and the clerks, at the same time, shall number the ballots, each clerk separately."

It was contended that it was impossible for the clerks at the close of the election to do these things which the statute provided, unless the box was there; and that, therefore, if the defendant took the box away, this statute was violated inferentially.

This would seem to be quite as strong an inference as could ever be drawn, but the fact remained that the Tennessee statute did not expressly and in terms prohibit the taking away of the box, which was the act complained of. Therefore, in order to find the defendant guilty, it was necessary, first, to engraft into the United States statute the Tennessee statute (section 1068), and then to infer

into the latter a prohibition which was not there in its terms but only by necessary inference.

Mr. Justice Blatchford, speaking for the Court, said (p. 287):

"It is contended that these sections *impliedly* require that the box shall be opened, and the names of the persons appearing in each ballot read aloud, at the place where the election was held, and that the ballot-box shall not be removed from the place where the election was held before the votes are counted. But this is urged merely as an implication. The statute does not provide distinctly and specifically, and in words required in a criminal statute, that the box shall be opened at the place where the election was held, and the names of the persons appearing in each ballot read aloud at that place, *and the ballot-box not be removed from that place* before the votes cast are counted." (Italics ours.)

And (p. 288):

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States v. Sharp*, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States v. Lacher*, 134 U. S. 624, 628."

Thereupon the Court sustained the demurrer to the indictment.

That case was a much stronger one for the Government than the case at bar, as the inference to be drawn was a much more obvious inference than the one sought to be drawn in this case.

In *United States v. Gooding*, 12 Wheat. 460, the opinion of Mr. Justice Story discusses the rule of strict construction of penal statutes and observes (p. 477):

“This is a penal act, and is to be construed strictly, that is, with no intendment or extension beyond the import of the words used.”

In *United States v. Houghton*, 14 Fed. 544, the defendant was charged with returning a false payroll to the revenue department. In the course of the instructions, the Court used, among others, the following expression (p. 547):

“In criminal as well as civil affairs every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry. This knowledge of the defendant must be affirmatively shown by the government.”

The following cases are also in point on the question of necessity for strict construction of penal statutes within the meaning carried by their own words and terms:

*Sarlls v. United States*, 152 U. S. 570;

*United States v. Reed*, 27 Fed. Cases No. 16136, p. 742;

*United States v. Harris*, 177 U. S. 305.

**THE GOVERNMENT'S CASES.**

Plaintiff in error will undoubtedly rely on:

*United States v. Trinidad Coal & Coking Co.*,  
137 U. S. 160;

*United States v. Keitel*, 211 U. S. 370;

*United States v. Forrester*, 211 U. S. 399.

These decisions do not, in our opinion, touch the question involved in the case at bar.

The *Trinidad* case, opinion by Mr. Justice Harlan, involved a suit in equity to set aside the patents to six tracts of coal lands acquired in Colorado, under the general coal-land laws of the United States. The case was decided on demurrer to the Government's bill. The sole question was whether the United States was entitled, upon the showing made by the bill, to the relief asked. It appeared from averment that the Trinidad Company, a corporation (which was held, pp. 168-9, to be an association within the meaning of the term, as used in the coal-land laws) being itself *disqualified* to enter any coal lands, under the general laws, because its stockholders had previously exhausted their rights by entering and purchasing from the United States other coal lands, which they then held, did on or about the 4th day of June, 1883, form a scheme to secure patents to the lands in question by having certain of its employees purchase the lands, not for their own use and benefit nor for



the use and benefit of any of the entrymen, but for the *direct use and benefit* of the corporation which was disqualified (as aforesaid) from taking the lands. In other words, the applicants were mere dummies.

This Court rightly held, in construing the general coal-land laws, that a person disqualified by reason of a previous entry to make an additional entry, could not accomplish the illegal end by indirection. That is, if he was disqualified under the law from acting directly he could not act through another.

It was said (p. 166)—referring of course to the general laws:

“The restrictions imposed upon the entry and purchase of the vacant coal lands of the United States have been so clearly expressed that no doubt can exist as to the intention of Congress in enacting the above sections. The statute authorizes an association of persons to enter not exceeding three hundred and twenty acres, and provides that only one entry can be made by the same person or association, and that ‘no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof.’ ”

This Court has never held that a person qualified to enter coal lands may not act through an agent.

How does the decision in the *Trinidad* case touch the case at bar? Neither of the two corporations mentioned in the indictment was disqualified to enter coal lands in Alaska or elsewhere. Neither one could, of course, enter more than 640 acres, under the general laws, outside of Alaska. All of the locators mentioned in the indictment were duly and legally qualified. They were not dummies in any sense of the term. (R. 36). There was no limitation under the Alaska law upon their rights to sell, or to agree in advance to sell; and there is no restriction in Alaska upon the number of claims that a qualified person (full citizen) or association may buy from locators, and carry to patent. The indictment charges that the locators were to have "pecuniary reward" or benefit. (R. 35).

The opinions in the *Keitel* and *Forrester* cases adhere to the doctrine announced in the *Trinidad* case. They decide nothing more nor less with respect to the limitations imposed by the general laws.

The present Chief Justice thus tersely states the point at issue in the *Keitel* case, under the general coal-land laws (p. 387):

"Under these sections the question is, Do they prohibit a person who is *disqualified* from acquiring additional coal lands from the United States, because he has already purchased the full quantity permitted by law, from employing one who would be

qualified if he made any entry of coal land, in his own behalf, to make such entry ostensibly for himself but really as agent for the *disqualified* principal, to pay for the land with money of such principal under the obligation, when the title has been obtained by purchasing from the United States, to turn over the land purchased to the concealed and *disqualified* principal?" (Italics ours.)

Here also we find an instance of the righteous condemnation of the Court, of an attempt by a disqualified person, to do indirectly that which he may not lawfully do in the open.

So in the *Forrester* case, the purpose and object of the conspiracy was averred to have been the obtaining by indirection, from the Government, the title to the lands in question for a corporation in a greater quantity than the corporation could itself legally acquire in Colorado under the general coal-land laws. It was again held that as the corporation was disqualified from acquiring the land from the Government, it could not indirectly acquire it through its agents.

The Court, however, brought in and applied the general construction to the "preference right" provided by section 2348, and decided that the "preference right of entry" was a mere right to make *cash entry*, and held that the same rule must necessarily apply. It was said (pp. 403-4):

"It being settled in that (*Keitel*) case that the prohibition against more than one entry of coal

lands by the same person prohibits a qualified person from entering such lands apparently for himself, but in fact as the agent of a *disqualified person*, it follows that the prohibition embraces an entry made by one through the procurement and for the benefit of another, although the entryman had previously initiated a preference right to enter the land for his own account. The mere preference right obtained as the result of taking the steps enumerated in sections 2348, 2349, Rev. Stat., including the filing of the declaratory statement, is, as described in section 2348, simply 'a preference right of entry, under the preceding section, of the mine so opened and improved.' Turning to section 2347, the preceding section referred to, it will be seen that the entry therein provided for *is the cash entry* made by applying to purchase the land, and contemporaneously therewith making payment for the same, which entry, as we have decided in the *Keitel* case, excludes the right of a qualified person to make the entry in his own name with the money and for the benefit of a *disqualified person*. When it is considered that the preference which the statute allows is but a right within the time limited in the statute to make the entry authorized by section 2347, it cannot be held, without destroying that section, that the obtaining of such mere right of preference authorized the making, not only of an entry which the statute permitted, but as well one which the statute forbade." (Italics ours.)

But it was not held, that the law prohibits a *qualified person* from entering such lands apparently for himself, but in fact as the agent of another *qualified person*, as distinguished from a *disqualified principal*.

There is no such thing as a "preference right" or a "cash entry" under the 1904 Alaska act. The "entry," as we have shown that term to be judicially defined in its relation to the public land laws (*supra*, pp. 44-48), is completed, under the Alaska act, by observing the requirements of sec. 1—locating the lands, which is done by marking the four corners thereof with permanent monuments, and filing for record in the recording district, and with the register and receiver of the land district, a specified notice of location. Thereafter, at any time within three years, upon complying with the steps specified in section 2 as to survey, posting and publication of notice, and payment,

"such locator or locators, or their assigns, who are citizens of the United States, shall receive a *patent to the lands located.*"

Sec. 3 makes provision for settling adverse claims, and quieting *title* in Court before patent. If the locator had no estate in the land, how could his *title* be quieted?

We have here an entirely separate and distinctive system relating to the acquisition of unsurveyed lands in Alaska—a law made by Congress, after the most careful consideration of the needs of the situation. The system practically follows the general mining laws, under which located claims have always been freely sold and purchased.

As was said by the trial Court (R. 40):

"Instead of attempting to state the provisions of the law of 1904 in different phraseology, I have quoted it because it is the opinion of the Court that it is not in any particular ambiguous. It means what the words selected by Congress express according to the common and general understanding of people accustomed to use the English language. It needs not to be construed, and there is no authority to interpolate into its provisions restrictions and limitations of rights which it grants, by judicial interpretation or construction. In the case of *Newhall v. Sanger*, (92 U. S., 765), Mr. Justice Davis said: 'There is no authority to import a word into a statute in order to change its meaning.'"

And (R. 40-1):

"To say that a vendee of a qualified locator, to be entitled to receive a patent, must be a citizen or association of citizens qualified as prescribed to make an entry of coal land, and not disqualified by having exercised a right to acquire coal land from the Government, infringes legislative power, for, in the guise of construction, a radical change in the law would be effected by the addition of requirements and restrictions which the law-making power did not put there. The words of the law are: 'That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, \* \* \* \*'. By having made citizenship a requisite condition of the right to receive a patent, the law makes citizenship the only requisite condition to the right. This is so by the rule declared by the Supreme Court in the words of Mr. Justice Davis above quoted, which is a fundamental rule for the construction and interpretation of statutes. *Expressum facit cessare tacitum.*"

**UNITED STATES V. DOUGHTEN.**

So far as known to counsel for defendants in error, there have been but two decisions rendered by any of the Courts involving the construction of the Alaska coal-land act of 1904. These two decisions were announced almost contemporaneously by two of the district judges of Washington. The opinion of Judge Hanford, sitting as circuit judge in the Western District of the state, in the case at bar, was filed on April 6th, 1911 (186 Fed. 375); and the opinion of Judge Rudkin, sitting as circuit judge in the Eastern District of Washington, was announced and rendered upon a demurrer to the indictment in *United States v. Doughten*, on April 15th, 1911 (186 Fed. 226).

These two co-ordinate Courts reached diametrically opposite conclusions upon the one vital issue involved, i. e., whether the restrictions upon an individual, or association, to purchase from the Government but a limited quantity of coal lands, as contained in the general coal-land laws, are to be read into and made a part of the Alaska act of 1904. Judge Hanford reached the conclusion, which we contend is right, that said restrictions do not apply to unsurveyed coal lands in Alaska, because the Alaska act is complete within itself (except with respect to the citizenship necessary to qualify the locators) and needs no construction; while Judge



Rudkin reasoned that, by construction, the two laws should not only be read together, but also be read with the original act of March 3rd, 1873; and that the restrictions contained in all the general laws, including the obsolete act of 1873, were thereby imported into the Alaska act and made a part thereof.

May we be permitted, in passing, to suggest here that this great divergency of opinion in the judiciary, as to the true meaning of the law, ought, within itself, to afford sufficient evidence of uncertainty or doubt as to repel any idea of criminal intent on the part of laymen to violate the laws of their country, and to defraud the Government, by proceeding in harmony with the views of the senior district judge of Washington, as expressed in the pioneer opinion.

Let us, however, briefly analyze the reasoning of Judge Rudkin as announced in his opinion in the *Doughten* case. He says (p. 231):

"The question here presented is one purely of statutory construction."

Later in the opinion he says (p. 232):

"The fact that section 2350 of the Revised Statutes limits its operation to entries made under the three preceding sections is to my mind of no moment. The original act used the expression, 'this act,' instead of 'the three preceding sections,' and in its last analysis the provision meant only that no

more than one coal land entry by a single individual was permissible."

We have elsewhere in this brief (*supra*, pp. 84-87), upon the authority of *United States v. Bowen* (100 U. S. 508-513), argued that the original act of March 3rd, 1873, went out when the revised statutes came in; and that when the meaning of the revised statutes is plain, as it is in this instance, the Courts cannot look to the antecedent statute which has been revised, to see if Congress erred in the revision, or to aid in the construction of the existing statute. Those principles thus announced in the *Bowen* case have been followed, reiterated, and re-affirmed by this Court in:

*Arthur v. Dodge*, 101 U. S. 34-36, construing the tariff acts;

*Deffeback v. Hawke*, 115 U. S. 392-402, construing public land laws;

*Cambria Iron Co. v. Ashburn*, 118 U. S. 54-57, construing the removal acts;

*United States v. Averill*, 130 U. S. 335-339, construing certain acts to regulate fees and costs for clerks, marshals, and attorneys of the circuit and district courts;

*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1-33, construing the patent statutes;

*Benson v. Henkel*, 198 U. S. 1-13, construing the judiciary acts;

and yet Judge Rudkin ruthlessly brushes aside as of "no moment" the very canon of construction announced in the foregoing decisions. Is the language of section 2350 not plain, unambiguous, and free from doubt? Can the meaning of the words, "the three preceding sections," be extended by construction to encompass three other sections of another law so as to make criminal that which the new law does not condemn?

When Congress, in June, 1900, extended to the District of Alaska *so much* of the public-land laws of the United States as relate to coal lands, "*namely* sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes" (31 Stat. 658), did it also extend to that district the laws which it had repealed and superseded by its revision twenty-seven years before?

And finally when in April of 1904 the act of June 6th, 1900, was amended by the passage of the present law, carrying the invitation to go into the great wilderness of the north and explore, find coal, and open up mines, did Congress intend to reach backward through the mist of three decades, and, by a mere inference, resuscitate and bring into action that obsolete, forgotten, and superseded law which now forms the chief cornerstone of Judge Rudkin's opinion; and hold it up to condemn and consign

to a felon's cell those sturdy citizens of this Republic who, having accepted the invitation of the Government to go out and explore, may, perchance, have found something worth their endeavor?

As was said by Mr. Justice Clifford in *Barnes v. The Railroads*, 17 Wallace 294 (p. 302):

"Where a section or clause of a statute is ambiguous, much aid, it is admitted, may be derived in ascertaining its meaning by comparing the section or clause in question with prior statutes *in pari materia*, but it cannot be admitted that such a resort is a proper one where the language employed by the legislature is plain and free of all uncertainty, as the true rule in such a case is to hold that the statute speaks its own construction."

And by Mr. Justice McKenna, in discussing the changes in the bankruptcy acts in *Pirie v. Chicago Title and Trust Co.*, 182 U. S. 438 (p. 448):

"The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued usually its words are, and an omission of the words implied an omission of the purpose."

So we may ask, was the restriction in the repealed act of March 3rd, 1873, left out of the Alaska coal-land act of 1904 by Congress to be put back by construction by the Courts? Suppose the Alaska

prospector is required to read the general coal-land laws, as found in the Revised Statutes, and which were extended to Alaska, in conjunction with and as a part of the 1904 act, is there any rule of law or reason that would suggest to him to substitute for the words "the three preceding sections," as found in section 2350, other and different words of a broader meaning? If Congress had so intended, why did Congress not so legislate?

Take from Judge Rudkin's opinion his erroneous reference to the words "this act," which he would import into section 2350 R. S., and read in lieu of "the three preceding sections," and the foundation for his conclusion is gone.

Judge Rudkin held that the whole question is one of construction, and that the true meaning of the 1904 act must be ascertained by reference through the Revised Statutes back to the obsolete act of March 3rd, 1873. Judge Hanford held that the Alaska act says what it means and means what it says, and needs no construction (R. 40).

### CONCLUSION.

In concluding this brief, we deem it not improper to make the following observations:

The District of Alaska contains about 600,000 square miles of territory and only 60,000 inhabitants. The population has not appreciably increased in ten years (U. S. Census).

The United States Geological Survey has already reported, upon cursory investigation, known areas of coal fields approximating 12,667 square miles, or more than eight million acres, estimated to contain one hundred fifty billion tons of coal. (Geological Survey Bulletin 442: Mineral Resources of Alaska, 1909, pp. 50-55.)

Such is the country with which Congress was dealing when it enacted the Alaska coal-land laws.

Congress has the plenary power to withhold or dispose of the public domain upon its own terms and conditions.

When the coal-land law of April 28th, 1904, was enacted, the unsurveyed coal lands lying within the District of Alaska were mineral lands belonging to the United States, and had, for thirty-two years, been declared by Congress to be *free and open to exploration and purchase*, under the regulations prescribed by law. No regulations for purchase of said

lands had previously been prescribed by any law. Congress had been told by its Public Lands Senate Committee, after months of investigation, that:

"There is a pressing need of legislation of the kind suggested in the proposed bill. As the laws now stand claimants cannot secure title to coal lands in Alaska." (58th Congress, Miscellaneous Sen. Rep., No. 1188, p. 2.)

Congress proceeded with deliberation, and after conference between its two branches, enacted, and the President approved, without any limitations (sec. 2):

"That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located,"

and thereby committed the national honor and integrity of the Government of the United States to make good its promise to convey to those, or to their assigns, whom it had invited to go out and explore, discover coal, and open up mines in the great glacial mountainous wilderness of Alaska.

Whether Congress legislated wisely or unwisely, as is now variously asserted by divers and sundry contentious political factions of the day, is beside the issue, but might well be put at rest by mere reference to the fact that notwithstanding six regular and several special sessions have passed since the law was enacted, it has not been repealed.



Neither are we concerned with any policy which Congress may hereafter adopt.

Long after the coal locations and entries involved in this suit were made, to-wit, on November 3rd, 1906, the acting director of the Bureau of the United States Geological Survey called the attention of the Secretary of the Interior to the fact that the coal and lignite deposits of Alaska were then known to be of some commercial value, and recommended that all Alaska coal lands be withdrawn and all coal entries be suspended in "the entire Territory." His brief note to the Secretary concluded as follows:

"I am sending with this a map of Alaska showing the distribution of coal and lignite so far as known, and also other mineral deposits, the economical development of which is dependent on a cheap fuel supply."

(Exhibit B, p. 206, Message from the President, 61st Congress, 2nd Session, Document 248.)

The acting director, by some remarkable process of cross-reasoning, reached the conclusion and set up the novel doctrine of economics that inasmuch as the other mineral deposits in Alaska are dependent upon a cheap fuel supply for their economical development, therefore no coal should be mined in "the entire Territory." Such was the official reason for setting aside the acts of Congress.

That recommendation was passed on to the President, who received it on November 7th, 1906, and on the same day ordered that the step proposed by the acting director, in reference to coal lands in Alaska, be taken. Accordingly, on November 12th, 1906, the President's directions were carried into effect, all the coal lands in Alaska were withdrawn, and all the coal entries in "the entire Territory" of Alaska were suspended. (Exhibit A, pp. 203-4, Ib.)

Thus was the Constitution held for naught, the needful legislation of the Congress nullified, and the Alaska coals locked up—as they have since remained.

Congress struck from the bill the restrictive suggestion of the Land Department that "no coal shall be mined *for sale outside* of said district (of Alaska) until a patent shall have issued for the land from which it is mined," for the reason that it was deemed unwise to restrict the disposal of coal mined in Alaska *before issuance of patent*. (*Supra*, p. 35.)

The Land Department has arbitrarily, by regulation (Rule 6, XXXV Land Decs., p. 675) put back the rejected restriction, enlarged its scope, and so construed it as to prevent all mining for any purpose, *either before or after payment*, with the result that through the *ipse dixit* of the Geological Survey, the will of Congress has been overridden and not a

ton of coal may be mined in Alaska today from land purchased from the United States and paid for.

The sequel is shown by the following brief statement of the Geological Survey contained in its report for 1910:

"Practically nothing was done in the coal fields except a few patent surveys. Most of the small mines which have in the past furnished lignitic coal for local use were in 1910 closed until the matter of granting patents should be finally decided."

Bulletin 480, Mineral Resources of Alaska,  
1910, p. 42.

By whom or when the decision in "the matter of granting patents" is to be made, is not disclosed by the report. Congress decided that matter in 1904, but it is apparent that there is, somewhere in the Land Department, a power which assumes to be greater than the Congress and superior to the Constitution which created the law-making body. This Court is now asked to decide whether the will of Congress shall prevail in the matter of the disposition of the public domain, or be stifled by the Geological survey or any other power. That is really the crux of the controversy involved in the suit at bar—whether the laws of Congress are to be observed, or Alaska is to be governed by the rules of a Bureaucracy.

Existing rights of the entrymen were, however, soon recognized by the Chief Executive, and the

sweeping order of withdrawal and suspension was, on January 15th, 1907, modified in the following terms:

"By direction of the President, all orders heretofore issued withdrawing public lands from entry under the coal-land laws are hereby amended as follows:

"Nothing in any withdrawal of lands from coal entry heretofore made shall impair any right acquired in good faith under the coal-land laws and existent at the date of such withdrawal."

XXXV Land Decs., p. 395.

On May 16th, 1907, the Commissioner of the General Land Office issued a circular of instructions to the Register and Receiver of Juneau, containing the following:

"4. All qualified persons or associations of qualified persons who may have in good faith legally filed valid notices of location under the act of April 28, 1904, prior to November 12, 1906, and the bona fide qualified assignees of such persons, may make entry and obtain patent under such notices within the time and in the manner prescribed by statute if they have not abandoned their right to do so."

XXXV Land Decs., p. 572 (Alaska Coal-Land Circulars).

Under the provisions of said last mentioned circular, the entrymen involved in the case at bar were permitted to and did survey their claims, com-

plete their final proofs, and pay for the lands; but the Land Office has withheld their patents (as well as those of all other Alaska claimants), and denies the right of every locator in all Alaska to mine coal.

The Government has affirmatively shown by the indictment that the locators have proceeded timely and in all respects as required by the strict letter of the Alaska law, and (R. 23) have already severally paid to the Government in the aggregate:

“the sum of fifty-seven thousand nine hundred and fifty dollars in lawful money of the United States, as and for the purchase price then and there required by law to be paid to the United States,”

for thirty-eight of said coal claims.

The fact that they borrowed the money upon mortgage security (R. 21) to pay the Government for the land cannot discredit their *bona fides*.

The acceptance of final proofs and purchase money implies that the law and the rules of the Department, with respect to all preceding steps, including the opening or improving of mines on the land, had been complied with.

The defendant, Archie W. Shiels, was one of the entrymen, and as such made proof and payment for his own claim. (R. 9.) He also acted as

the authorized agent of the other locators, as he had the right to do, under the rules of the Department.

(Rule 27, approved April 12, 1907.)

XXXV Land Decs., p. 680.

For the Government now to cancel those claims, confiscate the fruits of the labor and money bestowed and expended in their discovery, exploration, location, development and survey; forfeit the purchase money paid in, accepted and retained; deny to the locators, or their assigns, who are citizens of the United States, the *patent to the lands* which Congress has promised to them; and brand the entrymen and those aiding them as public criminals—which its Land Department is openly and notoriously attempting to do—would be an unjustifiable repudiation of the Nation's pledge of honor, upon the faith of which the lands were explored, located, opened, improved, and paid for; and, through the guise of some assumed public policy of limitation, or conservation, not found in the law, but imported or implied, to sustain this indictment, would involve the United States in the commission of a great moral wrong.

For the reasons and upon the authorities hereinbefore set forth, we most earnestly and respect-

fully ask that the judgment of the lower court be affirmed.

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**Seattle, Washington.**



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1911.

No. 593.

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THE UNITED STATES, *Plaintiff in Error,*

*vs.*

CHARLES F. MUNDAY, ET AL., *Defendants in Error.*

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**SUPPLEMENTAL BRIEF OF DEFENDANTS IN  
ERROR.**

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**RULE OF CONSTRUCTION OF PUBLIC-LAND  
LAWS.**

In the brief filed on behalf of the Government it is urged (p. 12) as a principle of statutory construction applicable to the act of 1904 that such statutes are to be strictly construed against the grantee, citing the case of Wisconsin Central Railroad Company vs. United States, 164 U. S., 190. The brief also in Appendix D quotes from the decision of the Commissioner of the General Land Office in

United States vs. Scofield, et al., in which the same rule is announced and authorities cited in support thereof.

An examination of these authorities will disclose that they all relate to private grants made by Congress or other legislative bodies and that none of them involves the construction of any of the general public-land laws. The rule thus invoked on behalf of the Government is announced in the early case of Slidell vs. Grandjean, 111 U. S., 412 (p. 437), in the following language:

"It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. *As a reason for this rule it is often stated that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to.*" (Italics ours.)

This rule is manifestly inapplicable to general public-land laws intended by Congress as means or instrumentalities to promote the exploration, settlement and development of the public domain. Such laws, being general in their character, are intended to be understood and acted upon by the ordinary layman, who has no voice in determining the language of the law and who is expected to interpret its words according to their ordinary meaning. Accordingly, such laws have uniformly received a liberal construction by the Courts.

In United States vs. Denver, etc., Railway, 150 U. S., p. 14, it is said:

"When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the Court a more liberal construction in favor of the purposes for which it was enacted.

In *United States vs. Iron Silver Mining Co.*, 128 U. S., p. 675, it is said:

"The statutes providing for the disposition of the mineral lands of the United States are framed in a most liberal spirit, and those lands are open to the acquisition of every citizen upon conditions which can be readily complied with."

In *Lake Superior, etc., Co. vs. Cunningham*, 155 U. S., 353 (p. 384), a liberal construction was adopted, the Court saying:

"But legislation respecting public lands is to be construed favorably to the actual settler."

Again, in *Knepper vs. Sands*, 194 U. S., p. 485, the Court said:

"The policy of the Government has always been favorable to actual settlers. As late as *Ard vs. Brandon*, 156 U. S., 537, it was said that 'the law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon.'"

A liberal construction of such laws was adopted by this Court in *Silver vs. Ladd*, 7 Wall., 219-224; *Johnson vs. Towsley*, 13 Wall., 72-90, and *Mining Co. vs. Tunnel Co.*, 196 U. S., 351, 352. The latter case involved the construction of the following words in the general mining law: "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The Court held that where a claim was located before discovery and a valid discovery was made within the limits of the claim thereafter and before application for patent, the law was substantially complied with and the locator entitled to his patent.

In *Silver vs. Ladd* (*supra*) this Court had under consideration the Oregon Donation Act, and there held the word "male" to include "female," so as to allow an unmarried woman to acquire title under the provisions of the Act.

We therefore respectfully submit that the Alaska Coal Land Act should be liberally construed in favor of those seeking to obtain title under its provisions.

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